HOTEL DU MINISTÈRE DES AFFAIRES ÉTRANGÈRES, PARIS

COMPTE RENDU DES SÉANCES

DU

TRIBUNAL D'ARBITRAGE

SIÉGEANT A PARIS, 1893

VI^E PARTIE

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31 MAI - 8 JUIN

Bering Sea Tribunal of Arbitration
Vol I

REPORT OF THE PROCEEDINGS

OF THE

TRIBUNAL OF ARBITRATION

CONVENED AT PARIS, 1893

PART VI

31ST MAY - 8TH JUNE

SPEECH

OF

SIR RICHARD WEBSTER, Q. C., M. P.

SPEECH

OF

MR CHRISTOPHER ROBINSON, Q. C.

I. — 34TH DAY; JUNE 7TH

II. — 35TH DAY; JUNE 8TH

Pages.

1359 1365 1366 1374 1376 1380 **Sir Richard Webster.** — Mr President, if I were to obey the dictates of my own inclination, I should state at once frankly to the Court that it was not in my power to assist them by fresh or additional observations in following, or attempting to follow, the argument that has been addressed to you by my learned friend, the Attorney General. I say it without the slightest shadow of reservation; I am not aware of a single point that has not been touched, or of a single ground that has not been urged, or of any substantial principle upon which the United States' Case is based, which my learned friend has not attempted to attack and grapple with.

1390 1390 And yet, Mr President, in all probability, I should not be altogether fulfilling my duty if I were to remain absolutely silent in connection with this discussion before this Tribunal. Having been chiefly responsible for the framing of the original Case, there are certain points upon which, in all probability, those who instruct me would think it right that I should endeavour, even at the risk of some repetition, to put forward before the Tribunal a summary of the argument which my honourable and learned friend, the Attorney General, has so admirably presented to you.

C.

I propose to rely largely, nay, almost entirely, on the intimate knowledge that this Tribunal must have of the documents and the correspondence which are in the voluminous papers that are before the Court. I propose with very few exceptions, indeed, to rely upon the memory of the Court of documents which have now for many days been under their eye and the contents of which have been discussed before them. I will only say I ought to have — I will not say that I have — at the present time, a pretty intimate knowledge of these documents myself; but if either of my learned friends on the other side who are good enough to listen to me, think that in making any statement with regard to the contention I am urging, I am not wellfounded either in fact or in regard to the contents of any particular document, I hope they will be kind enough to indicate it to me.

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Mr President, I am not unmindful of the extreme attention and the unvarying courtesy that has been displayed by every Member of this Tribunal to those who preceded me, and I know full well that that will be extended to me.

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Will you forgive me, Mr President, as I wish to waste no time at all, if I go at once to the questions in issue with but one preliminary observation — an observation I address not so much to you, Sir, as to those of the Tribunal who have practised in years gone by in the profession in which I have laboured now for a good many years. Those who have been advocates will, I am sure, appreciate that the work I have been doing during the last six weesk has not been perhaps that best fitted to enable one to present what I may call a finished address to the Tribunal. I have been doing, I hope, not altogether without some success, work which I have not been permitted to do for seven years, namely, that of a junior

counsel; but notwithstanding that I have by the accident of my position for the last seven years not been called upon to fulfil those duties, I have endeavoured to fulfil them at any rate to the best of my ability. But I desire the Tribunal to understand — I know the lawyers will — that that kind of work is not the best preparation for an address such as one would wish to deliver. Having made these very brief introductory observations, I will ask you now to permit me to go at once to the particular points upon which I have to address you : and without, so far as I may avoid it, any circumlocution whatever.

I propose this afternoon to address myself to the first four questions of Article VI. I hope that I can in the space of to-days' sitting bring before the notice of the Tribunal all that it is necessary for me to urge with regard to them. It is scarcely necessary, Mr President, that I should add, that, as my learned friend the Attorney General has done, I decline to argue the question of Regulations at all as a part or a branch of this subject. In my opinion, it would be contrary to the scheme of the Treaty; it would be contrary to the compact made between the parties before they were in Court; and although in the exercise of that discretion and of that courtesy which is recognised among members of our profession, on the wish being expressed by my learned friends on the other side that they should be permitted to mix up their arguments in one and deliver them at the same time, we did not think it necessary further to stand on our strict rights under this Treaty, we think that we should not have been doing our duty if we were, in anything we say on the five questions mentioned in the 6th Article, to trespass or trench upon the subject matter of Regulations.

Now, Mr President, Senator Morgan will forgive me if I refer to an observation that has fallen from him more than once, and which was alluded to by the Attorney General this morning, expressing a little doubt as to whether the five points mentioned in Article VI are really exhaustive of the questions of right submitted to this Tribunal.

I make an admission at once, perhaps going a little way beyond what the Attorney General has said, namely, that if the United States had desired to raise any additional question of right beyond those five questions, and had put them either in their Case, their Counter Case, or their Argument, we should have been bound to meet them. I shall not suggest that, under the points to which I will call attention directly, it was not open to the United States to have raised before this Tribunal any substantial question of right upon which they desired to invite the decision of the Tribunal; but the point which I desire to bring out prominently in relief, before I call attention to the learned Senator's remark, is this, that at no stage of this case, in the Case, the Counter Case, or the Argument, have the United States justified or attempted to justify their action except upon something which is fairly covered by and within the ambit of those five questions.

Therefore if any point is to be started, if it is to be suggested that the

United States have other rights under and by virtue of which they can maintain their position, or can justify their seizures, it would be started after the oral argument on both sides, except the reply, had been completed. I have not the slightest reason to believe that anything of the kind will be done. I believe that perfect candour and fairness have been shown by my learned opponents, — if they permit me to call them my learned friends I shall desire to do so — in connection with this matter; but I cannot help saying that if it were thought that there was some other justification of the action of the United States than that which is indicated in general in Article VI, expanded in particular in the Case Counter Case and Argument, one would have expected to find some trace of it; and with such industry as I have been able to bestow upon this case I am not aware there is any ground of justification put forward which has not been touched upon either: by my learned friends Mr Carter or Mr Coudert, or indicated in writing by my learned friend Mr Phelps, to all of which as I have already said my learned friend the Attorney General has addressed his argument.

Now the learned Senator has more than once directed attention to the difference between the words "question" and "point"; and I will ask leave to read once more the opening words of Article I, for I am not sure that he always had them in his mind, when he was making the observations so courteously to us. They are practically for this purpose the same as the preamble, but in order to omit nothing I had better read the preamble first:

> Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of America, being desirous to provide for an amicable settlement of the questions which have arisen between their respective Governments concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters, have resolved to submit to arbitration the questions involved.

I do not think it can be denied that what is there meant to be referred are the questions which have arisen between the Governments respecting the jurisdictional rights concerning the preservation of the fur-seal and the rights of the citizens, and if I turn to Article I the words, though not actually *verbatim*, are for all substantial purposes identical.

> The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur seal in or habitually resorting to the said sea and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters shall be submitted to a Tribunal of Arbitration.

The whole scheme, the whole statement, the whole sentence, is governed

by the opening words "the Questions which have arisen". I am sure the learned Senator will not think that I desire in any way to narrow the rights of the United States. I admit freely that they are entitled to raise in this Arbitration any justification of their action which appears either in their Case, Counter Case, or Argument, and fairly within the meaning of language there used.

Senator Morgan. — Sir Richard, will you pardon me for saying that my purpose was to arrive at what the duties of the Arbitrators are with respect to the rights of either party, not the rights themselves.

Sir Richard Webster. — I quite follow; and it was for that reason I wished to call your attention to this. I submit that the duty of this Tribunal is to determine the questions as to jurisdiction, to determine the questions as to preservation, and to determine the questions as to right—

Senator Morgan. — That are submitted.

Sir Richard Webster. — That are submitted; and I ask that the Tribunal in considering the matter will, at any rate, I am sure in fairness to those before them, if any other idea passes through their minds, indicate it to us, because when I come later on to examine the contentions of my learned friends, Mr Carter, Mr Coudert and Mr Phelps, you will find that they are all within the ambit of the five points which are referred to in Article VI.

Now, a few words only with regard to the origin of the points in Article VI. I am not going through the history again, because, some days ago, the Attorney General read the letters to you. They were framed originally, almost in the shape in which they now stand, by the United States. The fifth question was the one that was altered, because in the form originally proposed, it appeared to Lord Salisbury to assume too much right, to give too large a concession to the United States as regards their rights; and, therefore, the fifth question in the shape in which it now appears was framed about the middle of 1891, the earlier form of it having been proposed by Mr Blaine at the beginning of 1891 : it was framed in that shape, so that while it should not limit in any way the rights which the United States might claim, yet still it should not, on the face of it concede to the United States any position which Great Britain was not prepared to give them.

These observations, Mr President, when the Tribunal comes to frame its decision, will, I submit, be found not to be without their significance; because my learned friend, Mr Phelps, going, I am sure, as far as he could go and wishing to go as far as possible, indicated to you many days ago that, although he had no authority, to speak for the present Government of the United States as an Executive Officer, and though his position here was that of Counsel merely for the parties who instructed him, said he had no moral doubt in his own mind that the finding of this Tribunal, with regard to the five Questions submitted in Article VI, would be respected by the Government of the United States and

be upheld in so far as it was necessary to consider the questions which might ultimately arise under Article VIII.

I think I am correctly representing my learned friend the Attorney General when he said that of course with regard to any claim which Great Britain might make under Article V, the Government would feel bound to admit against Great Britain, if necessary, any finding of this Tribunal which arises in answer to the five points mentioned in Article VI. But what is the significance of this? Surely it is this, that if the United States had any right or any claim of right under which they could justify, or under which they were entitled to justify, their action, they must do it in their Case, Counter Case and Argument. They cannot ask from this Tribunal any finding, or the insertion of any words to indicate that behind the justification put forward in the five points mentioned in Article VI, there is some other justification not to be gathered from the written papers, not to be gathered from the oral argument, but to be held in reserve and to be used if necessary. I therefore ask the Senator, in common with every other member of this Tribunal, who I know will give what weight they think any observation of mine is entitled to — I will ask the Senator to let me assume — I say no more than that, for the purpose of my argument, that the justification for the acts of the United States is to be found in the five points enumerated in Article VI, and provided we are able to show to the satisfaction of this Tribunal that no one of those five points construed in its largest sense, giving to the language embraced in the points the full meaning such as is sought to be given to that language in the written and oral argument of my learned friends, — if we show that the claims which have been made to justify the action of the United States fail either on the ground of law, or because there are not facts to support the particular question or particular point urged on behalf of the United States, we are entitled to have that stated, as was indicated to you this morning, and entitled to have that found by the very terms of this Treaty; for you are directed to place in your award a distinct decision on each of the five points, and you are further told by the language of Article VIII that you are to find upon any question of fact involved in the claim, though, of course, you are not to award judgment for a specific amount, nor are you to direct the United States Government, or the British Government, as the case may be, to make any particular payment.

Now, what, is the meaning of these five Questions? I need only in two sentences repeat what my learned friend, the Attorney General, put before you many days ago. We understand the first four Questions to be pointing to the original title of Russia and the derivative title of the United States as the successors of Russia.

Perhaps there is one view of the fifth Question which I do not think my learned friend, the Attorney General, meant to exclude, but in respect of which I should be perhaps prepared to go a little further than his enunciation, as it appeared to me at any rate, to go.

The learned Attorney General was asked by you Mr President whether,

if we construed the fifth question in the way in which he was inviting you to construe it, it would not amount to a repetition of the first four Questions. Now, it seems to me to be quite clear, and only fair to the United States to say and I do not understand that my learned friend, the Attorney General, to say anything the contrary of this, that there is a view of the 5th Question upon which the United States are entitled to rely which is different altogether from the first four Questions. The first four Questions are conversant with rights asserted and exercised by Russia, with recognition by Great Britain of those rights, with the question of whether there was not, in the Treaty of 1825, a particular bargain between Russia and Great Britain about those rights, and whether or not the United States did not get unimpaired everything that Russia had. But there is this view of the 5th Question to which I am later on going respectfully to address the attention of the Tribunal. It may be that Russia never asserted or exercised her rights, and yet had them all the time. That question was undoubtedly intended to be submitted to this Tribunal by the fifth Question. It may be that the occasion for the assertion had not come, — that the occasion for the exercise had not come. The fifth Question was meant, in my submission, to ask the Tribunal whether or not the United States does, in fact, possess either by virtue of the United States' own position as a Nation, by virtue of the possession of the Islands, and, indirectly if you like, by virtue of her being the successor of Russia as well — does or does not the United States possess any exclusive right of protection or property in the fur-seals referred to in that Question?

There is one view — I only give it as an instance in which that question might become most material. You are well aware that there has been a discussion, many years ago — rather a burning discussion — as to whether or not the nation owning a particular territory had the exclusive right of fishing in the ordinary territorial waters. At one time there was some question about it. It is quite immaterial for my purpose to consider what are the rights or wrongs of that matter. It does not ultimately become material to this question. But assuming that the United States could have supported their contention originally put forward that either the whole of Behring Sea, or belts of 100 miles from the coasts of Behring Sea, were to be regarded as being in the position of territorial waters, it then would have followed that they might have exclusive rights in the fishery of seals in those waters, as distinguished from the fishery of seals in the high seas. Without in any way going back upon that part of the case which to me, at any rate to-day, has no more than historic interest, namely as to what the particular contention was that was put forward from time to time by the United States, on looking at the question broadly as to what rights the United States had at the time of the signing of the Treaty — if the United States could have made out that either by the acquiescence of Great Britain, or from the general position of the sea and the Islands or upon any other ground known to inter-

national law, they were entitled to the exclusive use of a strip of the sea outside the three-mile limit, then the questions of exclusive right of protection and property would have arisen just in the same way as they have from time to time arisen with regard to bays, with regard to enclosed waters and with regard to the strip next to the coast, be it three miles or more, as from time to time Nations have varied in the width to which they would claim exclusive jurisdiction. I therefore, point out for the purpose of my argument that when I deal with the rights of the United States as distinguished from the rights asserted and exercised by Russia, I shall propose to give the largest meaning to the five questions, in order that if the United States have any exclusive right either of protection or property in those fur-seals, they may have the benefit of raising that question before this Tribunal and of having an adjudication upon it.

Now I will take you for a very few moments back to the early history of this matter, and it is essential, at any rate in order to make my point clear, that I should ask you to go with me a little back in order of time. My learned friend Mr Carter, in his most interesting argument before you, told you more than once that for the purpose of the negotiations which were going on from 1821 to 1825, or rather, in order to be more accurate, from 1821 to 1824 between Russia and the United States, and from 1821 to 1825 between Great Britain and the United States, the North-West Coast was to be regarded as the strip of land shown on the map in pink colour and accurately represented in language by my learned friend the Attorney General as the *lisière*. Mr Carter, I think, without proving the statements, told you that whatever may have been the claims of Russia originally under the Ukase, whatever may have been the assertions in 1789, or 1821, that for the purpose of the bargain between the parties the north-west coast meant that and nothing more than that.

Mr Carter. — Not quite that. I did not confine it to the *lisière*.

Sir Richard Webster. — If my learned friend will pardon me, I think if he looks at latitude 60°, which was the point he took, this is how I understood it, but I am sure I take the correction — he said the North-West Coast went from 60° to 54°-40.

Mr Carter. — No, further down.

Sir Richard Webster. — I see my learned friend's point now.

Mr Carter. — The southern boundary is infinite.

Sir Richard Webster. — That points my observation, and, if possible, makes my point stronger when I come to develop it, that the North-West Coast extended northward of 60°, and the southern boundary may have been at 55° or elsewhere. I am obliged to my learned friend for the interruption. I did not mean to misrepresent him; but my mind was concentrated on what was the northern termination of the North-West Coast. I shall point out presently, and I hope this will not be lost sight of in my argument by the Tribunal, that as between the United States and Russia there never was any dispute about the northern boun-

dary of Russia at all; further, that as between Great Britain and Russia there never was any dispute at all about the northern boundary of Russia; the sole question was at what point the *lisière* should break away, so to speak, and give Russia the whole of the continent to the North-West. When I presently show its application you will find this is of extreme importance, and, I may venture to repeat myself, between the United States and Russia there was a discussion whether the boundary should be 51°. I only put this figure hypothetically. It makes no difference whether it is at 51°.50, or 54°.40, or at one time, as the United States said, as high as 57° or 58°. It makes no difference to my purpose. From beginning to end of the whole controversy during the years 1821 to 1825, no question ever arose between the United States and Russia as to whether the northern boundary should be up at 60° or at Behring Straits, or at Nushagak, or at any other point, in fact the discussion which has attempted to be imported into this controversy by my learned friend Mr Carter, who has gone, if he will forgive me saying, the extraordinary length of saying that the United States and Russia agreed that the North-West Coast, for the purpose of the Treaty, meant that little bit, the *lisière* — that after the southern point was fixed when in the Treaty of 1824 they talk of the North-West Coast, they meant the *lisière* — he has gone the length of saying that although Great Britain had no knowledge of it, yet Great Britain inherited as a sort of heir-loom, a *damnosa hæreditas*, if I may use the expression, a construction of the clause which upon its face the words will not bear, from the United States, because the language of a particular article was originally taken from the American Treaty.

I cannot help reminding you, Sir, that when pressed by a question from the Tribunal, " should you, Mr Carter, say that if in the correspondence between Great Britain and Russia it was clear that the words had been used in another sense? " Mr Carter, with a frankness I should have expected, and which we all should have expected from him, said at once, " No, I should not ". Then, said the Member of the Tribunal, the question is, what was the meaning which had been put upon those words in the correspondence between, not the United States and Russia, though that for this purpose would not make any difference, but between Great Britain and Russia. Upon that we did not hear one single word of argument from Mr Carter or from Mr Coudert in following him.

Now let me take you to the earliest period of time, so far as it is material. Is it the fact that when the parties began to assert their claims and rights respectively, they were between themselves, so to speak only referring to the North-West Coast, meaning thereby nothing north of 60°? I will not involve the question again by trying to fix a southern boundary; that is immaterial for my purpose, were they speaking of a coast which was to have nothing on it north of 60° or of an ocean which was not to go north of the Aleutian Islands. I have ventured to put upon a map. — I will hand you a copy and lend one to my learned friends, and perhaps they

will be good enough to lend it to the Court afterwards — it is my own work and therefore I will take the responsibility for any faults that there are — I have put what was the state of things so far as the case shows prior to the year 1821. The whole of this is taken from the British Case, and it shows, I think at a glance, that the statement made that all that the people knew about or cared about in connection with the North-West Coast was south of latitude 60° is not accurate.

You will observe what has been done. I will not take it in order of date; it would occupy a little time, but I will take it in the order that the information is given on the map. If you start at Sitka, I have drawn a red line, and I have put the names of the vessels, the " Caroline " and " Eliza; " and the place where that is to be found in the British Case is page 20. The year is 1799. The nationality, so far as it could be ascertained, which is indicated by an initial, in that case happens to be American. That was a case in the year 1799, when the " Eliza " visited Sitka. The next in 1802 was a vessel called the " Jenny "; and then, if you will look at Behring Bay, you will find the " Jackal ", a British ship, 1792 to 1794. Then opposite Mount St Elias, which was mentioned in reference to it, you will find La Pérouse went in a French vessel in 1786, mentioned in the British Case at page 17.

Now I desire to call attention to two localities well-known now, Cooks Inlet and Prince William's Sound; and I call attention particularly to this, Prince William's Sound is about 200 miles to the westward of the line of boundary, or latitude 60°; and Cooks' Inlet is considerably further.

Then, Mr President, if you will observe with reference to Prince William's Sound, there are several cases of vessels going there. The " Phoenix ", which was a British ship; the " Fidalgo ", a Spanish vessel, both in 1790. Portlock and Dixon were there in 1786 to 1789; and Vancouver in 1794. Then, if you go to Cook's Inlet, Douglas was there in the year 1791, the name of hisvessel was, I think, the " Iphigenia "; and Portlock and Dixon also and Vancouver. Then, the Spaniards visited Kadiak, in 1788; and in 1800 the " Enterprise " and in 1808 the ' Mercury ", both being British ships. Then, if you will run your eye along to Unalaska, you will find that was visited by the Spaniards in 1788; and by a man whose voyages are well known, Meares; and the Island of Atka was visited — also by Meares in the years 1785 and 1786.

Then, on the coast of Kamschatka, you will find two voyages to a place now know as Petropaulovsk — in 1792, the " Halcyon " and the " Flavia " and, as you will be good enough to run your eye to the extreme North, where you will find a mark put of Pigott's voyages (to which I shall make reference later) as far as Kotzebue Sound; and I shall show you, by the correspondence, he had been trading all along the coast of Kamschatka as well as visiting parts of the coast of America in Behring Sea.

Now I may be permitted to remind you that the whalers of 1842 were in Behring Sea. I have merely indicated it and given the reference

to it. It is in the British Case, page 83, so that even from what we are able to trace in respect of a district comparatively speaking, of course, little opened up, there had been substantial trading, and this will be found to have been the main ground of the attempted action by Russia — there had been substantial trade to various places well to the north, using the expression of my learned friend, Mr Carter, of latitude 60°.

Therefore, upon the face of this information, you would not expect to find the North-West Coast was to have the limited meaning which my learned friend, Mr Carter, wishes to give to it.

Mr Justice Harlan. — Is this a copy of a map of any particular date as to the names and spelling, and so on ?

Sir Richard Webster. — It is the Map N° 1 of the United States Case — Behring Sea, North Pacific. I do not think they give the date. I merely used it because it happened to be the most convenient to put the names on. It has no value beyond being distinctly authentic as coming from the United States — but upon that I wrote down those names, taking them myself from the Case — the dates, boats, and the voyages; and I desire, before I break off to point out that while I am going to show you that complaints of trade along these coasts led to the action of Russia, it is idle to suppose that we know anything like the whole of the vessels trading along the coast. There was no reason as is observed in the British Commissioner's report and in the Case for the vessels registering their names — there was no reason for their names being known. I do not suppose that ports of registry existed on this coast, at any rate there was very little indeed to lead these vessels to record the places that they called at when trading with the nation, but even with the limited means of information that we have we are able to show that when Russia began to make her complaint the position was that there had been substantial navigation, substantial trading and substantial interference with the rights which she very properly desired to protect far away to the north of the point which according to my learned friend Mr Carter's argument was the only point the parties cared about.

Mr Justice Harlan. — Did the contest between Great Britain and Russia at that time embrace any settlement on either side of what is now called Behring Sea.

Sir Richard Webster. — I do not think so.

Lord Hannen. — As a matter of fact Captain Cook took possession of certain portions in the Behring Sea.

Sir Richard Webster. — I should have said with reference to Mr Justice Harlan's point I think it is obvious that at that time the parties were not relying strictly and solely upon their right of first possession because Great Britain had, if it had been a contest as to territory, probably an earlier claim to parts in Behring Sea than Russia, but that brings out the point to which the Attorney General called the attention of the Tribunal many days ago, that Great Britain cared very little about the coast — in fact it was comparatively immaterial provided the right of free navigation

and free fishing was not interfered with and was enjoyed by her subjects after the year 1821 as they had been before.

Mr Justice Harlan. — Your argument is that the North-West coast extended all round there to these different points visited by the British vessels.

Sir Richard Webster. — I say the North-West Coast extended right up to Behring Straits. I say that of this contention of Mr Carter's, for the purpose of the Treaty of 1825, that that is the North-West Coast, there is not a trace to be found in any original document or contention. This is not to depend on the assertion of counsel. If the document exists showing the word North West Coast at that time was understood to mean that, that document would have been produced; and, of course, when it is produced I will deal with it. I am prepared to refer if necessary to any documents to which my learned friend can call attention.

I shall refer pointedly to one, which is the Baron de Tuyll's communication, which shows that the Company tried to get a limit put, not on the words North West Coast, but on the right to visit during 10 years. I assert, and I beg the Tribunal to take it as my recollection of the reading, that from beginning to end of this correspondence there is not a document indicating that North West Coast was understood by Russia, the United States, or Great Britain, as stopping at any point whatever north of 54°40'. It went from whatever the southern boundary was — 55° at one time in the days of 1799 — right away up through Behring Sea; and it is the simple fact, and you will find it of great importance, that between the United States and Russia there was no contention whetever as to the northern boundary of Russia. The whole point was, how far south can we stop Russia coming to? And as between Great Britain and Russia you will find, — except to ascertain the point of departure where that line running north was to go up so that Russia had everything to the west of it — there was absolutely no contention between Great Britain and Russia as to the point on the coast to which the Russian possessions went.

The President. — If you say that the contention merely bore on those parts of territory and seaboard, how can you imply that Behring Sea was contained and comprised in those definitions?

Sir Richard Webster. — I am afraid I have not made my meaning clear. I say the contention bore from whatever point in the South you liked to fix right to the extreme North.

The President. — There was nothing in question as to Behring Sea coast?

Sir Richard Webster. — Nothing, except the right of navigation and fishing. I must have expressed myself very badly if I had not conveyed that.

The President. — As regards the coast, there was no contention except as to what?

Sir Richard Webster. — As regards navigation and fishing, and the

right to visit uninhabited points in accordance with international law. The whole area, up to the North, was in question.

Mr Justice Harlan. — There were no conflicting settlements?

Sir Richard Webster. — There were no conflicting settlements on the coast between Great Britain and Russia. There was no question of a claim to territory by Great Britain on the coast of Behring Sea.

If you would look at page 38 of the British Case, you will find Russia's description of the North-West Coast at the time of the Ukase, the attempt to exclude other nations from exercising then right :

> Section 1. The pursuits of commerce, whaling, and fishery, and of all other industry, on all islands, ports, and gulfs, including the whole of the Northwest coast of America, beginning from Behring Straits to the 51st of Northern latitude.

Therefore, I do not start with that, because it does not happen to be quite the earliest document; but there is a document, which I am going to make allusion to where our construction of " North-West Coast " is put by Russia, and there is not a single document in which a trace can be found of a different definition of "North-West Coast", not a single document; yet my learned friend, Mr Carter, says that " North-West Coast " is to be regarded as beginning at 60° ", if I may use the expression, and coming downwards, after the Treaty he says, ending at 54°40'. My whole point is, there was no discussion as to the point on which Russian possessions ended on the coast itself away to the North.

The Tribunal then adjourned for a short time.

Sir Richard Webster. — Mr President, I find that by inadvertence I made a mistake in regard to that map. I had originally put the red marks on the " number one " map in the United States Case. When I directed a copy to be made for Mr Phelps and the court there were no copies of "number one" to be had, and therefore those red marks had to be put upon a map of ours. Mine is on the original; but there is no difference. There is nothing upon the map except agreed matter. I only desire to correct a mistake I made by inadvertence, not remembering that they had not been plotted on the same map as the one of the United States.

The President. — I believe it is on your map which is in the Appendix?

Sir Richard Webster. — I am not sure if it is even that. Yes, you are right, Mr President. It is the one which is in the 4th volume of the Appendix to the British Case. There are only two maps which were exhibited.

I am with the permission of the Tribunal, directing their attention to the period before 1821. I am not upon the period of 1821 at all. Two matters were prominently brought forward in the United States case during this period as bearing upon the assertion and exercise by Russia of certain rights; and I call the attention of the Tribunal to page 42 of the United States Case. You will see in a moment, Mr President, when I read this language, the importance that they attach to the exercise by

Russia as distinguished from the assertion; and on page 42 of their Case, which still stands not withdrawn, there occur these words. I believe that the Tribunal have seen the copy that Mr Foster was good enough to agree upon with me, showing what was cut out from the United States Case, and therefore I need not at any time refer to anything that has been cut out. But this paragraph still stands :

> The official Russian records show that after the ukase or charter of 1799, granting to the Russian American Company certain exclusive control of trade and colonization, its authorities, acting under the sanction of the Russian Government, did not permit foreign vessels to visit Behring Sea.

Now you will observe the importance of it, Mr President in a moment. They were desirous of proving that Russia had exercised more or less jurisdiction in Behring Sea. What the character of the jurisdiction she asserted was I shall discuss later on. I speak subject to correction when my friend Mr Phelps comes to reply, or at any time, if he wishes to correct me; but I am not now aware of any document, official or otherwise, that supports the allegation to the slightest degree that the Russian Company or Russia did not permit foreign vessels to visit Behring Sea after 1799. On the contrary as I shall show you in a very few moments on the face of the original documents it is quite clear that foreign ships were visiting and were trading in Behring Sea between 1799 and 1821; but that I may keep strictly to the order of the dates, I must again remind the Tribunal... for it seems to have been forgotten by my learned friends... how it was that the Ukase of 1799 came to be made. It is stated at page 15 of the Counter Case of the United States that the Ukase of 1799 was directed against foreigners. I ask the attention of the Court to this matter; because this is after the withdrawal of the documents which the United States most properly and frankly withdrew. They repeat their statement that the Ukase of 1799 was directed against foreigners. That is to be found on page 45 of the United States Counter Case. Upon this point a quotation is given from a letter from the Russian American Company to the Russian Minister of Finance, under date of June 12th, 1824. I ask the attention of the Tribunal to that date, not 1799 or about that date, but June 12, 1824. The quotation is a follows :

> The exclusive right granted to the Company in the year 1799 imposed the prohibition to trade in those regions not only upon foreigners but also upon Russian subjects not belonging to the Company. This prohibition was again affirmed and more clearly defined in the new privileges granted in the year 1821 and in the regulations concerning the limits of navigation.

Therefore you will observe, Sir, that both in their Case they assert that official documents will show, and in their Counter Case they allege, again referring not to a contemporaneous document but to one of 1824, that the Ukase of 1799 was an executive act intended to operate against foreigners.

What are the facts? I wish to take this as briefly as possible, because

if I call the attention of the Tribunal to it they will be good enough, I have no doubt, to note it as being of importance. At page 22 of the British Case will be found the history of the Ukase of 1799. I will quote nothing which depends upon what I may call doubtful British testimony. What I am about to quote comes from Russian sources, in so far as Bancroft, among others may be said to be a Russian source. I will call your attention, Mr President, to page 23, speaking of the period just before 1799 :

> Thus, on every side, rival establishments and traders were draining the country of the valuable staple upon which rested the very existence of the scheme of colonization. To the east and north there were Russians, but to the south-east the ships of Englishmen, Americans, and Frenchmen were already traversing the tortuous channels of the Alexander Archipelago, reaping rich harvests of sea-otter skins, in the very region where Baranoff had decided to extend Russian dominion in connection with Company sway.

Lord Hannen. — What is the Alexander Archipelago?

Sir Richard Webster. — The Alexander Archipelago is that which is in the right of the Alaska Coast, practically down the *lisière*. It is that cluster of islands. It is on that part of the coast which Mr Carter calls the North-West Coast.

Lord Hannen. — That was the name of it?

Sir Richard Webster. — I think it was only the temporary name. I am not sure that it has been continued since.

Now, Mr President, you will find — and the Tribunal will forgive me if I attempt to pass this somewhat shortly — that there was a Russian committee directed to sit upon this matter ; that they reported, as stated on page 24, with reference to the petition of the right to monopolize ; and that the Ukase of 1799 was in consequence of a Russian representation that the Company as it was then constituted could not compete successfully with other trade competitors ; and I want to know what answer, Mr President, is to be given to the United States view of this in the state papers in the year 1824, an extract from which is set out on page 28. To-day the United States people say the Ukase of 1799 was intended to operate against foreigners. What did they say in the year 1824? I call the attention of the Tribunal to page 28 :

> The confusion prevailing in Europe in 1799 permitted Russia (who alone seems to have kept her attention fixed upon this interest during that period) to take a decided step towards the monopoly of this trade, by the Ukase of that date, which trespassed upon the acknowledged rights of Spain ; but at that moment the Emperor Paul had declared war against that country as being an ally of France. This Ukase, which is, in its *form*, an act purely domestic, was never notified to any foreign State with injunction to respect its provisions. Accordingly, it appears to have been passed over unobserved by foreign Powers, and it remained without execution in so far as it militated against their rights.

I appeal from the United States of 1892 to the United States of 1824 ; I appeal from the period of comparative ignorance to the time when knowledge must have been fresh, information easily to be acquired,

and facts easy to be ascertained. And the official Minister of the United States in 1824 states that the operation of the Ukase of 1799 was purely domestic. The counsel for the United States to-day, being desirous of proving an assertion and exercise by Russia, state formally in their case that after the Ukase of 1799 foreign ships were not allowed to enter Behring Sea, and they further state that it was intended to operate against foreigners. Is it not saying too much; and I respectfully challenge my friend Mr Phelps when he comes to reply — my assertion is worth nothing unless I support it by reference to documents — to point to any act done by Russia; to point to any exclusion of foreign ships at any time — anything, which is in support of this allegation.

Mr Justice Harlan. — Sir Richard, can you refer me to that document of June 12, 1824, referred to in the Counter Case of the United States, page 15, the one you read a while ago? I do not know where it is in the record.

Sir Richard Webster. — I will in a moment, Judge. It is not printed; but that extract is correct.

Mr Justice Harlan. — It is correct?

Sir Richard Webster. — Oh, yes; that extract is correct. We have only got the Russian document, not the other parts; but it is a perfectly correct extract; and I call your attention, as you have been good enough to allow me to do so, to the date as being in 1824, when, as you know, Sir, the company were doing the utmost they could to support the Ukase of 1821. Therefore I am justified in saying — and I am sure you will follow me — that in no sense, from the point of view I am following, was it a contemporaneous document.

But it is curious, Sir, that the official document of the 7th of April 1821, coming from the United States Minister at St Petersburg contradicts that, if any reliance can be placed upon it for in 1824 the official Minister of the United States, writing to Mr Adams, makes that statement with the authority of his position at a time when unquestionably the company were using all the powers they had to get an extension of their privileges.

But, Mr President, this matter is really put beyond all question by the Riccord-Pigott correspondence; and this incident in the case is a very curious one. I trust my learned friends will not misunderstand me. I am satisfied that everything that has been put forward on behalf of the United States both by their agent and their counsel has been put forward in the fullest good faith; but I shall have to call attention to the fact that when it is necessary to remove the impression of an argument which is founded on original and official documents, they are suggested for the first time in this case, after the lapse of years and years, to be either incorrect in their phraseology or to have a different meaning to that which the words themselves would indicate. That occurs more than once in the course of this case.

Now, sir, in the original case now withdrawn, the Riccord-Piggott

correspondence was put forward as an instance of Russia preventing foreign trade. It is sufficient for my purpose to call your attention, Sir, simply to the fact—I read nothing from it—that on page 45 of the United States Case, the Riccord-Pigott incident appeared as under the date, quite correctly, of 1819. It ran through four pages, from 45 to 49; and it was used, perfectly legitimately — as the documents were then supposed to exist : — in order to support the case, whichthey then believed to be the truth, that Russia had prevented vessels from going into Behring Sea. Will you be good enough, Mr President, to kindly let your eye run on to page 49—all is now struck out from page 45 to page 49—but at page 49 you will observe that the thread of the story is then taken up :

It thus appears from the foregoing citations that, so far as it concerns the coasts and waters of Bering Sea, the ukase of 1821 was merely declaratory of proexisting claims of exclusive jurisdiction as to trade, which had been enforced therein for many years.

That is not withdrawn. That is a statement made on evidence which they then believed to be true, that for many years the trade of foreigners had been prohibited in Behring Sea.

The Ukase of 1799 which set forth a claim of exclusive Russian jurisdiction as far south as latitude 55°, called forth no protest from any foreign powers, nor was objection offered to the exclusion of foreign ships from trade with the natives and hunting fur-bearing animals in the waters of Behring Sea and on the Aleutian Islands as a result of that ukase and of the grant of exclusive privileges to the Russian American Company. It was only when the ukase of 1821 sought to extend the Russian claim to the American continent south to latitude 51°, and to place the coasts and waters of the ocean in that region under the exclusive control of the Russian American Company, that vigorous protests were made by the Governments of the United States and Great Britain.

Therefore, Sir, there stands to-day that statement, without — I say it with great respect — a shadow of evidence to support it, that prior to 1824 the Ukase of 1799 had been used to exclude foreigners, and that in fact the only complaint was the extention of the Ukase of 1821.

Now, Sir, I have said that the Riccord-Pigott incident, struck out — honestly and fairly struck out — from their case when they found that they had relied upon falsified documents, when you look at the true documents, is an absolute contradiction of their statement as to the exclusion of foreign vessels from Behring Sea. I will take this as briefly as I can, but it is of some importance. May I ask you to be good enough to turn to page 18 of the British Counter Case. The original documents are set out in the revised translation supplied us by the United States at pages 13 to 17 of Volume one; but you need not refer to that. You will find all that is material at pages 18 and 19 of the Counter Case. Now, Sir, what are the facts?

Riccord and Pigott had made a contract with the Russian American Company to go whaling; the monopoly having been guaranteed to Russian subjects : the Government objected — not at all improperly — to an Englishman having any interest in it; and accordingly you will find at

page 18 the extracts from the letters referred to, from which it appears that Riecord, the Superintendent of Kamtchatka, had made an agreement with Pigott, an Englishman, for ten years, from 1819,

> with reference to fishing for whales and extracting oil from these and other marine animals on the shores of Kamchatka and on those of all Eastern Siberia, in the harbours and bays and amongst the islands.

I need not remind you, Mr President, that Eastern Siberia is washed by Behring Sea. It is not a question of the Pacific Ocean only. It is a question of the waters right up into Behring Sea.

Justice Harlan. — That Pigott is marked on your map?

Sir Richard Webster. — That is marked on the map at Kotzebue Sound. That is on the other side. I was at present taking it up in the order of time. At present we have got him only as far as Kamchatka.

Lord Hannen. — You did not read all of that. It reads "On the shores of Kamchatka".

Sir Richard Webster. — Perhaps I did not express myself plainly. I am now merely dealing with the Western side, Kamchatka and Eastern Siberia, not with the United States side.

Now, what is the objection which the Governor takes? I will tell you, Mr President, if you will look at the original correspondence. It turns out that the company were unwilling to enter into the whaling trade. It did not pay or they supposed it would not pay. Whereupon they were directed to turn their attention to the whale fishery; and the Government further ordered that no foreigner should be allowed to enter a merchant guild, or to settle at Kamtchatka or Okhotsk, and that no foreign merchant-vessel should be permitted,

> to trade at those places under any circumstances, or to enter the ports of Eastern Siberia except in case of distress... Furthermore, the Englishman Davis at Okhotsk, and Dobello's agent in Kamtchatka are to be informed... that the Government refuses them permission to remain at those places, or to build houses or hold real property there; the local authorities shall afford them all proper facilities for disposal of their property and leaving the country.

Sir, as time is of great importance, I will merely mention — it is not necessary to read it — the rest of the document at page 14. I am quoting from the United States translation at page 14 of Appendix I. It will appear that in the end the only prohibition was against holding land or entering the trade guilds; and more than that, that they might be in Behring Sea is obvious because they could not very well enter the ports of eastern Siberia except in case of distress, unless they were up there somewhere in the sea. I need not pause to argue that, because the facts are conclusive. If you, Mr President, and the other members of the Court, will kindly look at page 19 of this correspondence produced to us upon notice to Mr Foster, you will find a letter that shows that Pigott was trading on the coast of Behring Sea, and had gone up as far as Kotzebue Sound, the place I quoted when Mr Justice Harlan was

good enough to put the question to me, and a letter of January 21, 1821, puts it beyond all doubt what the fact was :

On the 29th September, 1820, the American brig "Pedlar" arrived at this port. Her captain is Meek, a brother of Meek who is well known to you. She had on board Mr Pigott, with whom you are well acquainted. He was the supercargo or owner ; for the cargo was under his control, and he directed the movements of the ship. He had come from Kamtchatka in eighteen days.

There were at that time two men-of-war on the roadstead, and this fact afforded me frequent opportunities of meeting Pigott, for he was acquainted with the officers of both of them. *They had met beyond Behring Straits in Kotzebue Sound*, and had been anchored there together. He said, in a hesitating way, that *he had been trading there.*

I must confess that *I was wrong when I said*, in a letter to Michael Michaïlovitch *that a single man-of-war would be sufficient to put an end to this traffic.*

It is not necessary, of course, to point out that if this were not something serious, it would not have been spoken of in this way.

To tell the truth, I did not believe it at the time ; but I was afraid that a whole squadron, or at least a couple of frigates, would come down upon us. This prospect frightened me, both as Manager of the American Colonies and as a Russian. They would have eaten up all our provisions, and cost the Emperor a lot of money, without doing much good.

What hope is there that a single frigate will be able to stop this traffic on our shores, abounding in straits and excellent harbours, *and so well known to these Americans that they may be called the pilots of these coasts?* They will always be on good terms with the natives...

Is it not a little strong, Mr President, for my learned friends, in the face of the facts that their own documents disclose, to adhere, as I understand then to adhere, in their Counter Case, to the view that prior to 1821 there had been a prevention of trade and an exclusion of foreigners from taking part in the trade within the prohibited region?

Lord Hannen. — Was there not, Sir Richard — I am not dealing with its effect — a prohibition of trade with the natives on the shores by the Russians?

Sir Richard Webster. — At what date, my Lord?

Lord Hannen. — Well, from the date of 1799.

Sir Richard Webster. — I think there was. The important point is that it was in order to prevent, if they could, access to the shores, and that it is wholly untrue to suggest, as the original Case did, that the object of the Ukase of 1799 was to prevent the vessels from navigating the waters of Behring Sea or from exercising rights upon the high sea. I think what my Lord Hannen was good enough to refer to is section 10, (on page 13 of the British Counter Case), of the Ukase of 1799 :

10. In granting to the Company for a period of twenty years, throughout the entire extent of the lands and islands described above, the exclusive right to all acquisitions, industries, trade, establishments, and discoveries of new countries, etc.

I am not sure, my Lord, that in terms the Ukase of 1799 prohibited foreign trade ; but it is not material for my purpose. I would assume

that the general effect of it may have been to give foreign trade, as far as Russia could, to the particular company. But the point that I desire to bring out is that there is absolutely no evidence of any exercise of the right of exclusion by Russia. On the contrary, when you come to look at the documents, it is clear that there had been extensive interference with their foreign trade, which the company objected to.

Mr Justice Harlan. — Whatever rights were given by that Ukase were given exclusively to this company?

Sir Richard Webster. — Certainly.

Mr Justice Harlan. — Whether they extended to the whole ocean or only to the coasts or islands?

Sir Richard Webster. — So far as Russia was concerned, whatever she gave, she gave it exclusively to the company. It is quite clear that the United States' view in 1821 was that it had no operation against foreigners, and I submit it would have no operation against foreigners. Its object was to consolidate the many rival companies. That is stated also in Bancroft's book, quoted in the British Case, but I do not go back upon that.

Now, Mr President, if you will turn over to page 20 of our Counter Case, you will find there the letter from the Governor-General of Siberia :

> *We are familiar with the complaints made by the American Company in regard to the bartering carried on by citizens* of the United States at their establishments, and in regard to their supplying the natives with fire-arms. *These complaints are well founded, but nothing can be done in the matter.* It would be useless to apply to the United States' Government to stop the trading: the commercial rules of the United States do not allow such interference on the part of their Government. *The only thing to be done is* for the Company to endeavour to strengthen the defences of the principal places in the Colonies, and for the Government, at least, *not to favour this foreign trade.* But the establishment of a whale fishery on the eastern shores of Siberia would undoubtedly favour it in a high degree. The establishment of a whale fishery would be a pretext for, and an encouragement to, foreign trade.

Later down in the same letter :

> Mr Riccord—
>
> He was the Superintendent of Kamschatka—
>
> *says*, in his letter, *that, owing to the smallness of our forces* in that part of the world, *we cannot prevent foreigners from whaling.* In the first place, we may not be so weak as he supposes. The occasional appearance of a single properly armed ship may be sufficient to keep quiet and disperse all these whalers.

Then on the 28th of February, 1822, you will find that the object which was recognized there was to get a footing for this purpose — for the purpose of the collecting furs on the Aleutian Islands,

> or on the northern islands situated in the direction of Behring Strait, that he made his proposal, of which you have already been informed, with regard to whaling and fishing for the benefit of Kamtchatka and Okhotsk.

In the face of that, Mr President, it is not too much to say, I submit, that regarded from the point of view of information and facts gathered from every source, there is not the slightest shred of evidence beyond the withdrawn documents, now admitted to be untrustworthy and not to be relied upon, of any exercise by Russia at all prior to 1821.

Now I come to 1821; and I must be permitted to make a few observations with regard to the Ukase of 1821. I read to you, Mr President, before we adjourned, at the suggestion of my learned friend, Sir Charles Russell, from page 38, I think, if I remember right, of the British Case, the language of the Ukase; and I need not read it again. I may have to refer to it perhaps in another connection. Now I ask the kind attention of the Tribunal to a point made by my learned friend Mr Carter, which, if I may be permitted to say so as an advocate, certainly was somewhat surprising. He said Russia never attempted to claim any exclusive jurisdiction in any part of Behring Sea: that it was not a claim to exclusive jurisdiction; and Mr Carter supported his statement by printed passages in the Argument. I can give the references in case they be required.

Says Mr Carter, it was not a claim to exclusive jurisdiction; and here again I speak with care. For the first time, for the purposes of this argument, it is suggested that the claim to exclude the ships of all nations 100 miles from the coast is not a claim to exclusive jurisdiction and exclusive dominion. I confess, so far as advocates are allowed to have feelings, that a feeling of surprise did come across me. It occurred to me that this proposition required some authority: that excluding vessels from 100 miles from the coast was not an assertion of exclusive dominion and an exercise of exclusive jurisdiction.

I desire to say here with reference to an observation made by Mr Justice Harlan more than once to my learned friend, the Attorney-General, that I do not think that Russia had any intention of closing Behring Sea. I do not think that Russia at that time knew anything about, the actual width of the passes. I do not suppose the passes had been surveyed. They may have had sufficient knowledge to know that they might have closed it, or they might have not. That they claimed that this part of the world had all the characteristics which would have justified them in closing the whole area, there is no doubt; but I am disposed to adopt, if I maysay so, the view put forward by Mr Justice Harlan, that whatever they meant by their hundred miles, they did not have it in their mind that thereby no ship would be able to go into the middle of Behring Sea; but if once that be recognized, it strengthens my position enormously. For on what authority of text-book, judicial writer, or judgment, can my friend suggest that excluding ships, excluding navigation, from a given belt from your coasts is not making them, even something more than territorial waters, for it is an exercise of dominion. Why, Sir, may I remind this Court, every member of which, I know, is acquainted with the fact, that it has been a subject of discussion whether even within

the three-mile limit there is not a right of navigation for peaceful purposes. I know Mr Justice Harlan was good enough to read through, or look through, the judgments in Queen v. Keyn. There is a very considerable discussion in many of the judgments in Queen *v.* Keyn as to whether in territorial waters, that is to say in waters in which, for certain purposes, undoubtedly the country had exclusive jurisdiction and exclusive dominion, whether the right of peaceful passage was not still an international right. I believe I am not going too far in saying that all the Judges took that view; and yet in the face of that discussion, counsel are found to say that the claim to exclude ships from 100 miles of the coast is not an attempt to exercise over those 100 miles sovereign jurisdiction.

I have looked at several books, and I might really occupy as many hours as I wish to occupy minutes, in citing authorities to show that the origin of all this idea of exclusion was an extension of dominion over territorial waters, land-locked seas, and a variety of arguments that have been brought forward to give exclusive dominion; but I will content myself with reading from Chancellor Kent. I ask the Tribunal to listen to what Chancellor Kent said of this claim of Russia, which is sufficient for my purpose. Mr President, you know Chancellor Kent by name, the great American jurist. This is in the original edition. When I say the original edition, I am not certain it is in the first, but it is one of the editions which were edited by the great lawyer himself; and I read from the 9th edition, published in 1858, from the original page 31, the original text, volume I :

> The claim of Russia to sovereignty over the Pacific Ocean, north of the 51st degree of latitude as a close sea, was considered by our Government in 1822 to be against the rights of other nations.

Mr Chancellor Kent was not in the habit of using either vague language or uncertain language. He describes it there as the claim of Russia to sovereignty; and I want to ask this Tribunal — I must not anticipate what I have to say later on in attempted reply to Mr Phelps, argument, but I ask again, is there the vestige of an authority for the suggestion that the right to exclude other ships from navigating a belt of water along side, on the borders of, a coast, is otherwise than an act of sovereignty? Why, the very acts that we have got to discuss later on, the acts which are properly justified as municipal statutes, Acts of Parliament, in order to protect certain interests there, are a very much less exercise of the sovereign power of legislation, and are justified and supported by special considerations. But this was a claim to exercise exclusion, or to confiscate vessels if they came within 100 miles of the coast; and yet, knowing the stress of the position, counsel suggest that that was not the exercise of exclusive jurisdiction, but was what they are pleased to call a defensive regulation.

There is not, Mr. President, as far as I know, as far as my research has enabled me to trace out this matter, a vestige of an authority, in text-book, judgment or legal writer, to indicate that exclusion of vessels

from a margin of the sea — absolute exclusion — is otherwise than an act of dominion and an act of sovereignty. Why, really, if you will look at the citation at page 141 of the United States argument, from Sir Henry Maine, you will find these words. I might refer to half a dozen authorities cited by Mr. Carter; but at the bottom paragraph of the citation from Sir Henry Maine, you will find this :

At all events, this is certain, that the earliest development of maritime law seems to have consisted in a movement from *mare liberum*, whatever that may have meant, to *mare clausum* — from navigation in waters over which nobody claimed authority, to waters under the control of a separate sovereign. The closing of seas meant delivery from violent depredation at the cost or by the exertion of some power or powers stronger than the rest. No doubt sovereignty over water began as a benefit to all navigators, and it ended in taking the form of protection.

And at page 146, quoting from the opinion of Sir Robert Phillimore, in Queen *v.* Keyn :

According to modern international law it is certainly a right incident to each state to refuse a passage to foreigners over its territory by land, whether in time of peace or war. But it does not appear to have the same right which respect to preventing the passage of foreign ships over this portion of the high seas.

And the passage, Mr. President, which I referred to just now is at page 40 of the same book, where in his argument upon this question, Mr. Carter states it in this way :

Russia never at any time prior to the cession of Alaska to the United States claimed any exclusive jurisdiction in the sea now known as Behring Sea, beyond what are commonly termed territorial waters. She did, at all times since the year 1822, assert and enforce an exclusive right in the " seal fisheries " in said sea, and also asserted and enforced the right to protect her industries in said " fisheries " and her exclusive interest in other industries established and maintened by her upon the islands and shores of said sea, as well as her exclusive enjoyment of her trade with her colonial establishments upon said islands and shores, by establishing prohibitive regulations interdicting all foreign vessels, except in certain specified instances, from approaching said islands and shores nearer than 100 miles.

Now, Mr President, let us just for a few moments consider what the assertion of Russia was; and I will ask you once more to turn to the language of the Ukase of 1821, which will be found on page 38 of the British case. The statement is as conveniently set out there as at any other place.

Section I. The pursuits of commerce, whaling, and fishery, and of all other industry, on all islands, ports, and gulfs, including the whole of the north-west coast of America, beginning from Behring Straits to the 51st of northern latitude; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands, from Behring Straits to the south cape of the Island of Urup, viz., to the 45° 50' northern latitude, is exclusively granted to Russian subjects.

Section 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia, as stated above, but also to approach them within less than 100 Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.

Senator Morgan. — Does anybody know whether there is a " comma "

in front of the words, " beginning from Behring Straits ", in the original text?

Sir Richard Webster. — In this copy there is a comma in front of the second " Behring Straits ". There is no comma at the first one. It is, " beginning from Behring Straits to the 51st degree of northern latitude — on the eastern side; and " from Behring Straits to the south cape of the Island of Urup " — on the western side. That was the claim of Russia.

Senator Morgan. — The question I had in my mind was whether that was not a new description of the North-West Coast, adopted by Russia.

Sir Richard Webster. — No — " from Behring Straits to South of 51° north latitude ", is the same description. It is new in one sense — that there are four of five others suggested in the course of the argument by my friends. It is no new description as far as we are concerned — it is the description of the North-West Coast of America, as far as I know, that prevailed throughout.

Senator Morgan. — The " North-West Coast of America " might, in a certain aspect of the subject have referred to a limited portion of the shore.

Sir Richard Webster. — Perfectly true.

Senator Morgan. — Whereas, in giving an implied latitude to the grant of privilege there, they might have made it more specific by saying the " North-West Coast of America ", and then make a new definition, giving the beginning of it.

Sir Richard Webster. — The words are " the whole of the North-West Coast of America " — perfectly true; and if there be a document — and I hope this will not be forgotten — giving another meaning to " north-west coast ", at any stage of this correspondence, I will read it of course, and not only read it, but will point out, (if there be such a document) its full meaning against me. But I must in deference to what you have been good enough to put to me — say that I assert again, from the time of the Ukase, down through the whole history, to the cession in 1867, there is not a document that suggests that " North-West ", had the limited meaning.

Now my friends say this : " It is perfectly true that the Ukase did include the whole North-West Coast : It is perfectly true that the Ukase did include the whole Pacific Ocean and Behring Sea — (I am using that expression so as not to be thought to be begging it against them — what they call the " Pacific Ocean ", and Behring Sea) — but the Treat y did not, and therefore, you, Great Britain acquiesced in the claim of Russia in Behring Sea ". Is that true, or is it not, Mr President? I do not wish to do an injustice, if I can avoid it, to my friend. I will read two passages from the Counter Case and Argument which make this clear.

At page 19 of the Counter Case they say this :

The Ukase of 1831 evoked strong protests, and the character of these protests is explained at pages 50 and 51 of the Case of the United States. It is further pointed out at pages 52 and 53 that in the treaties resulting from these protests a clear dis-

tinction is intended to be drawn between the Pacific Ocean and Behring Sea, and that by formally withdrawing the operation of the Ukase as to the Pacific Ocean, but not as to Behring Sea, a recognition of its continued operation over the latter body of water was necessarily implied.

Now there is nothing much stronger than this assertion which they have attempted to prove — that inasmuch as the Treaties themselves, either on their face or by looking at documents which Great Britain could not deny — either from the Treaties and those documents, " Pacific Ocean " does not include " Behring Sea " ; " North-West Coast" does not go further north than 60°. Therefore there is an ample recognition of the continued operation of the Ukase of 1821 over Behring Sea and over the North-West Coast, north of 60°.

Now Mr President, I must address myself to this point, having full regard to the nature of this Tribunal, and not being able to dismiss it in the summary way that I should in an ordinary Court of Justice in our Country. Mr Carter tells me that the United States Counsel are not quite in the same position as we are, but that the opinion of United States Counsel is supposed to give validity to arguments; therefore they also vouch them, and therefore I must deal with this matter. I find at page 36 of the United States Argument, this statement :

In the view of the undersigned, Mr Blaine was entirely successful in establishing his contention that the assertion by Russia of an exceptional authority over the seas, including an interdiction of the approach of any foreign vessel within 100 miles of certain designated shores, while abandoned by her treaty with Great Britain in 1825 —

I ask the Tribunal to notice this —

as to all the northwest coast south of the 60th parallel of north latitude, was, so far as respects Behring Sea, and the islands thereof, and the coast south of the 60th parallel, —

that is a mis-print, it is " *north* of the 60th paralled " —

never abandoned by her, but was acquiesced in by Great Britain.

It would have been more satisfactory to us (and I think it would have been more satisfactory to the Tribunal), if inasmuch as a definite finding in favor of the United States is asked on this point, Mr Carter had found it possible to have indicated to us what the arguments were in support of that complete success of Mr Blaine; but inasmuch as I am determined, at any rate, that the Tribunal shall know the exact position, will they give me their kind attention for a few moments while I endeavour without one word of colour of my own, to show that the confidence in the success of Mr Blaine was not such as Mr Carter has thought fit to indicate at page 36; and I will ask the Tribunal (if I am not unduly trespassing on them), to turn to Appendix II to the British Case, because the few documents I have to refer to happen to be set out *verbatim* there.

I turn, first, to part 2 page 1. I am not going to read the letter, but

I am going to state, Sir, what it contains. It is the first announcement from the Chevalier de Poletica to the Secretary of State of the United States. It is under date of the 28th February 1822. In that letter the expression " North-West Coast ", occurs six times. We are not now on the question of a charter to a company — we are not now on the question of privileges given to individuals — we are on the question of international negotiations, and there is not less good faith between nations than there is between individuals. The phrase " North-West Coast " is used six times. In every instance it is used of the coast extending from Behring Straits to whatever point in the south the Russian dominion went to.

Therefore, upon the question of what " North-West Coast " meant in the opening letter to the United States dealing with these negotiations, " North-West Coast " has a distinct and recognized meaning.

What about " Pacific Ocean? " " Pacific Ocean " occurs several times, but I will call attention, if you please, Sir, to the passage on page 3 near the end of the letter :

> I ought, in the first place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend on the North-West Coast of America from the Behring Straits to the 51st degree of north latitude.

No Russian minister has ever attempted to put upon this language the construction my friends seek to put upon it. According to my friend, Mr Carter, the bargain which followed out this negotiation, without any change of expression, is to be supposed to have intended a different meaning to these words. When that negotiation commenced, " North-West Coast " had a distinct and definite meaning for the purpose of that negotiation. " Pacific Ocean " had a distinct and definite meaning for the purpose of that negotiation. The two are consistent. If " North-West Coast " means the *lisière* only from 60°, then " Pacific Ocean " does not include Behring Sea. If " North-West Coast " does go up to Behring Straits " Pacific Ocean " does include " Behring Sea ", and I am not overstating the case as you will find — in every single instance in which that occurs in that letter those are the meanings of those words.

Now that is the opening of the negotiation with the United States. Now let us took at the opening of negotiation with Great Britain.

Would you be good enough to turn back to page 1 of the first part — it is the letter from Baron Nicolay to the Marquis of Londonderry. It is in French, but perhaps I ought to refer to the two letters — Baron de Nicolay's of the 31st October, including Count Nesselrode's of the 7th October. They are at pages 1 and 3 of the first part. They are both in French, but any member of the Tribunal who will kindly run his eye down will be able to see the words in a moment in several places : *Les côtes nord-ouest de l'Amérique appartenant à la Russie ; les côtes nord-ouest de l'Amérique : La côte nord-ouest de l'Amérique, depuis le détroit de Behring jusqu'au* 51°.

Then turning over the next page you will see :

Cette partie de l'Océan Pacifique, que bordent nos possessions en Amérique et en Asie. —

that is, the Pacific Ocean which bounds our possessions in America and in Asia. And further down in the same letter there is another reference to the Pacific Ocean.

Now this letter of the 7th October, from Count Nesselrode to Count Lieven, again has many references both to the North West Coast and the Pacific Ocean, and again occurs the phrase. *Les possessions Russes sur les côtes nord-ouest de l'Amérique et nord-est de l'Asie.*

And then again : *La côte nord-ouest de l'Amérique, depuis le détroit de Behring jusqu'au 51 de latitude septentrionale* — a further reference to the Pacific Ocean. Therefore, in the documents which open the diplomatic negotiations these words are used, and used in the only sense in which they could be used, as meaning the whole " North-West Coast ", the whole of the " Pacific Ocean ". Is there less good faith between nations than between individuals? I am to be followed by one whom I know to be a great lawyer and advocate and diplomatist. Will my friend, Mr Phelps, suggest — I know he will not — that good faith between people who are negotiating, between nations, is less than between individuals? If anything — if there could be such a difference of standard — it should be higher; but at any rate it should be as high.

Now, Sir, the position of things is this — that had this been an ordinary contract between individuals and you wanted to turn round and say : It is quite true that we began the negotiation understanding what we meant by " Northwest coast " : it is quite true that we began the negotiation understanding what we meant by " Pacific Ocean ", but in the course of the negotiations those words acquired a different meaning : " North-West coast " no longer meant what we called it " from Behring Straits to 51° ", it only meant " from 60° to 54° ". " Pacific Ocean " no longer meant what we called it, it only meant "that part of the Pacific Ocean which is south of the Aleutian Islands".

I will appeal to any judge — to any one who has any judicial or legal experience. Assuming that a negotiation between individuals starts with both parties understanding "Pacific Ocean", and " North-West Coast,' as meaning what I have said, and one of the parties after the contract turns round and says : " Oh no, when I made the contract with you I meant something quite different by those two expressions", what is the first thing a judge would say? It is : " Where, in the course of the negotiations did you ever call the attention of the other party " to the fact that you were using the expressions in a different meaning? I hope I have made my point clear to your mind, Mr President — I do not wish to repeat myself — I say, starting in October 1821, through the whole course of these books (and all the original documents are here), there is not a trace of the suggestion of a change of meaning in either " North-West Coast " or " Pacific Ocean", so that the point which

Mr Senator Morgan was good enough to put to me for my consideration tells in my favour, because they were using words in a meaning perfectly well known to the parties. But is there anything the other way?

Mr Justice Harlan. — Will you let me ask you, Sir Richard, if it will not interrupt you, what do you think Mr Adams meant in his letter to Mr Middleton of July 22nd when he said " the Southern Ocean "?

Sir Richard Webster. — To what page are you referring, Judge?

Mr Justice Harlan. — To page 141 of vol. I of the Appendix to the Case of the United States.

Sir Richard Webster.. — To what passage, Judge, might I ask?

Mr Justice Harlan. — The third paragraph.

Sir Richard Webster. — The paragraph commencing : " The United States can admit no part of these claims "?

Mr Justice Harlan. — Yes.

Sir Richard Webster. — It says :

> The United States can admit no part of these claims. Their right of navigation and of fishing is perfect, and has been in constant exercise from the earliest times after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which so far as Russian rights are concerned are confined to certain islands north of the fifty-fifth degree of latitude, and have no existence on the continent of America.

I may tell you, Judge, that I am very much obliged to you for pointing it out to me — it fits in exactly with the point I was going to have urged to you later on. At this time it was a recognized principle — when I say recognized it was a principle of international law — I do not really know that it does not prevail up to the present time — but at this time it was a recognized principle of international law that you might land on unoccupied coasts, in the course of general rights of fishing and navigation. Would you kindly look again at that book. I am going to read from page 10 of the 2nd part of the same book with reference to Mr Justice Harlan's point which he was good enough to put to me. This is a letter from Mr Forsyth who was Secretary of State.

Mr Justice Harlan. — The letter is from Mr Forsyth, Secretary of State to Mr Dallas.

Sir Richard Webster. — The second paragraph of the letter is this (See Appen H B. C. part 2 p. 10 :

> The 1 st article of that instrument is only declaratory of a right which the parties to it possessed, under the law of nations, without conventional stipulations, to wit, to navigate and fish in the ocean upon an unoccupied coast, and to resort to such coast for the purpose of trading with the natives.

I do not know, Judge, whether you know that the same claim was made by the United States much later in connection with the Falkland Islands It was at this time — I do not know that it is not still — supposed by international law that you could land upon an unoccupied coast, and without any grant or permission for the purpose of trading with the na-

tives; and speaking of that, Mr Wheaton at page 171 referring to this very trading says :

> Admitting that this inference was just and was in contemplation of the parties to the convention —

That is about the ten years :

> it would not follow that the United States ever intended to abandon the just right acknowledged by the first article to belong to them under the law of nations *i. e.* to frequent any part of the unoccupied coasts of North America, for the purpose of fishing, or trading with the natives.

Now, my answer to you, Mr Justice Harlan, is this ; — That Mr Adams, when he wrote on the 22nd of July, said : we cannot admit your territorial claims down to latitude 51° ; we cannot admit your right to prevent us from navigating and fishing, for the only possessions that you have occupied are certain Islands north of the 55° of latitude, and therefore he was again referring to what he believed to be the true view of international law, that, if the Russians had got no occupation, they could not prevent other nations from landing.

Mr Justice Harlan. — I do not think you quite appreciated my object in asking that question, Sir Richard. In the paragraph before, Mr Adams describes the protection of territorial jurisdiction " from the 45th degree of North latitude on the Asiatic coast to the latitude of 51° North on the Western coast ".

Sir Richard Webster. — You will observe, Judge, that no Northern limit is mentioned.

Mr Justice Harlan. — Yes.

Sir Richard Webster. — It goes up to Behring's Straits.

Mr Justice Harlan. —

> And they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

Then he proceeds to announce what he understands to be the principal rights of navigation and fishing of the citizens of the United States throughout the whole extent of the Southern Ocean.

Sir Richard Webster. — That is the same thing as the " Pacific ".

Mr Justice Harlan. — That is what the object of my question was, — to know, when he used the words " Southern Ocean ", whether he meant by that phrase to include the waters of Behring Sea up to Behring Straits?

Sir Richard Webster. — Most certainly. I am extremely obliged to you, Judge, for this, or any other question. If it be necessary to demonstrate that, I can demonstrate that the " Southern Ocean " and the " Pacific Ocean " were used as interchangeable terms repeatedly at this time; and my point is, in reference to Mr Adam's letter, that there is not a word to suggest that he stopped at 60°.

I did not mean myself to refer to this letter, because I was treating the correspondence as a whole; but there is not a word to indicate that he stopped at 60°, according to Mr Carter's contention, — that they were giving up any right, not only with regard to Behring Sea, but anything which was to the north of that point 60°. All I say is this, that no other construction can fairly be put on that language at the present time. And I think, Sir, there is conclusive proof of what I am saying. I need not trouble you to look at it, but in Volume I of the Appendix to the British Counter Case is set out a letter from Mr Adams to Mr Rush, on the same date, the 22nd of July, 1823, to which you referred me. Mr Rush was the Minister to Great Britain, and, in the last paragraph but one from the bottom of page 56, it says :

> By the Ukase of the Emperor Alexander of the 4th (16th) September, 1821, an exclusive territorial right on the north-west coast of America is asserted as belonging to Russia, and as extending from the northern extremity of the continent to latitude 51° and the navigation and fishery of all other nations are interdicted by the same Ukase to the extent of 100 Italian miles from the coast.

I need not say that Mr Adams would not refer to the Ukase in two letters witten upon the same day referring to it as excluding Behring Sea in one, and including it in the other. In the paragraph above that to which I call attention, he quotes the Ukase as being the claim of exclusive jurisdiction from the 45th degree of north latitude on the Asiatic coast to the 51th degree north on the American continent. He is coming all the way round, and then he refers throughout to the whole extent of the Southern Ocean, and many people at that time spoke of the " Pacific Ocean ", as being the *Southern Ocean*, because they got to it by coming round Cape Horn. Now I pass on, having, I hope, not improperly endeavoured to answer the question you were good enough to put to me. My point is, that those are the still meanings of those words. Do they change it? Will you be good enough to turn over to page 63 of the first part of vol. 2 of the Appendix to the British Case? Here, at least, I am upon safe ground. The first letter I read, Mr President, was on October 21st.

The President. — On page 63 it is not a letter, but a draft.

Sir Richard Webster. — The actual letter is given on page 61, but to save you trouble, I was giving the page where you would find the actual document I was going to refer to. The document is a draft convention enclosed in a letter of the 12th June 1824 nearly three years — you will follow me — after the letter of October 1821. What did Great Britain understand by " Pacific Ocean "? — what did Great Britain understand by " North-West Coast " at this time? This is supposed to be, according to my friend, a communication of people who were using " north-west coast " and " the Pacific Ocean " in different senses to those which I have indicated were put upon them when the negotiations commenced. Will you kindly look at the page to which I call attention — page 63. (Part. 2, Appen II B. C.) I will read the English translation, although

both the English and French texts are cited side by side. It says :

It is agreed between the High Contracting Parties that their respective subjects shall enjoy the right of free navigation along the whole extent of the Pacific Ocean, comprehending the sea within Behring's Straits.

It is a little strong to suggest that the people who made the Treaty a few months after this were not getting the right of navigating and fishing in Behring Sea when they were writing on July 24th, and there using the expression Pacific Ocean in the sense of the sea extending right up to Behring Straits so as to include the sea within Behring Straits. Would you kindly turn, if I am not unduly trespassing upon you, to the *contre-projet* which is given in French, and you will find it at the beginning of page 65, there you will find no suggestion from Russia that Great Britain was using " Pacific Ocean " or " north-west coast" in a different meaning. On the contrary, the objection taken to the language, as you will remember, — the Attorney General called your attention to it — was not because Russia did not wish to give a right of navigating in Behring Sea, but because they thought that the *contre-projet* might give a right to visit places north of Behring Straits, and yet it is to be supposed that the parties were negotiating, having again put a limit to the ordinary words " Pacific Ocean " and " North-West Coast ".

Lord Hannen. — The 7th Article, as it appears to me, must point to this, that the Russians treated the Pacific Ocean as reaching up to Behring Straits.

Sir Richard Webster. — Yes.

Lord Hannen. — I think it is absolutely demonstrated that that is so by these three Articles V, VI and VII. It draws a distinction in the VIIth : between the Pacific Ocean up to Behring Strait, and the sea beyond.

Les vaisseaux Britanniques et Russes naviguant sur l'Océan Pacifique et la mer ci-dessus indiquée

That is the sea to the north of Behring Strait.

qui seront forcés par des tempêtes, ou par quelque autre accident à se réfugier dans les ports respectifs, pourront s'y radouber et s'y pourvoir de toutes choses nécessaires, et se remettre en mer librement, sans payer aucun droit hors ceux de port et des fanaux, qui n'excèderont pas ce que payent les navires indigènes.

Then at the end the expression is, " où il aura abordé ".

Sir Richard Webster. — Yes. Would you look at Article VI, which says :

Dorénavant il ne pourra être formé par les sujets britanniques aucun établissement, ni sur les côtes ni sur la lisière du continent comprises dans les limites des possessions Russes désignées par l'Article II.

As to every document I might take up out of some forty or fifty, the some observation might be made. I might say here — I do not court interruption—I am only giving notice to my friend Mr Phelps — that there is

not one single document of all these in which the more limited meaning is put on " North West Coast "; and, therefore, although I have endeavored to pick out the striking ones, they are by no means the only documents that support my contention. It is the fact that in negotiations extending for years between three great Powers — Russia and the United States : Russia and Great Britain — there is not a trace of this contention made for the first time by Mr Blaine in the year 1890, in answer to Lord Salisbury.

Mr Justice Harlan. — Let me put this to you in that connection, if I am not interrupting. I understand both sides to contend, or to admit that Russia did not intend, by the ukase of 1821, to close Behring Sea, and that she was not so understood by either side at the time as intending to close Behring Sea, although Mr Canning suggested that a limit should be put.

Sir Richard Webster. — You must exclude Behring Straits, Judge. It would have closed it on the North. I am speaking of closing it from the South.

Mr Justice Harlan. — I understand that. Mr Canning said the application of that 100-mile limit would close Behring's Straits.

Sir Richard Webster. — Certainly.

Mr Justice Harlan. — And, therefore, would keep British vessels out of the Arctic Sea. Now, if Russia did not intend to close Behring Sea or interfere with navigation in it anywhere outside of the 100 Italian mile limit, and neither side understood her as doing more than that, why should they have had in mind any terms in the different *projets* or in the Treaty towards securing equality of rights in Behring Sea?

Sir Richard Webster. — For two reasons. In the first place, because, whether it closed Behring Sea or not, the 100-mile limit would have practically excluded ships from a vast portion of Behring Sea, as to which the Duke of Wellington and others objected most strenuously, and the United States too. It was not a question of closing the Sea only, but a vast portion of Behring Sea.

Mr Justice Harlan. — But neither the United States nor Great Britain had any settlements on the Behring Sea coast.

Sir Richard Webster. — It was not a question of settlements.

Mr Justice Harlan. — Or any trade.

Sir Richard Webster. — I do not at all agree that they had not any trade, — it is not a question of settlements. I have read to you, in answer to your question, a few moments ago, the statement made by the United States' official, that at that time the right of navigation, was considered by international law as giving you the right to trade with natives where there was no occupation of the coast by the dominant Power. I read Mr Forsyth's letter, and I read from Wheaton; and I could find you many traces of that in the other diplomatic correspondence.

Senator Morgan. — Has that rule or principle of international law gone out of use?

Sir Richard Webster. — I referred to that a few moments ago, Sir. With regard to the Falkland Islands in 1835 certainly the United States contended that they, as far as the Falkland Islands were concerned, — I am not so sure that it has absolutely gone out of use —

General Foster. — In that case it is not the fact that the United States admitted that it was no mans land — not as to Falkland Islands.

Sir Richard Webster. — I beg General Foster's pardon. The United States said, (I will refer to the Case) that even if it belonged to the Argentine Republic we have by international law a right of fishing in the high seas and the right of landing at unoccupied places on the Coast. I must call attention to it, but I must keep myself to my point. I do not at all complain of the interruption.

Senator Morgan. — My point was that it seemed to me from the argument here on both sides that international law, by which we are supposed to be compelled to be governed, has a formative growth and decay accordingly as it adapts itself to the necessities of mankind.

Sir Richard Webster. — By the assent of Nations undoubtedly.

Senator Morgan. — But how are we to ascertain whether the assent of nations has been obtained?

Sir Richard Webster. — If there have existed at starting rights which have not been interfered with.

Senator Morgan. — The question comes back, how long would it take to establish a principle of international law, and how long would it take for that principle to die out?

Sir Richard Webster. — You talk of a short time and a long time according to the acts of Nations and according to the evidence of acquiescence; but I am sure, Senator, you do not want me to be taken away from my point, because it is really important that I should make my point clear without discussing collateral matters; but I promise not to forget your observations. My point was (you will forgive me for repeating it), that throughout the whole of this correspondence the navigation of Behring Sea up to the Straits is the basis upon which they are negotiating.

Now the only other document my friend, Mr Carter, thought worthy of notice was Baron Tuyll's note; and I care not, whether I refer to the original French, or the translation. The original French is at page 37 of the British Counter Case; the translation is at page 276 of the United States Appendix, volume I. Now here you would have expected that if the meaning of the words North West Coast now suggested was correct you must have found something pointing to it. I read from the translation :

> Explanatory note to be presented to the Government of the United States at the time of the exchange of ratifications with a view to removing with more certainty all occasion for future discussions, by means of which note it will be seen that the Aleutian Islands, the coasts of Siberia, and the Russian possessions in general on the North-West Coast of America to 59°31' of north latitude are positively excepted, etc.

That is on the North-West Coast of America, — from what point? Obviously from Behring Straits. Does anybody mean to suggest that it starts at 60°? It is so obvious! From 60° to 59° 30' is only 30 miles! Does any man in his senses pretend that when they speak there of the North-West Coast of America down to 59° 30' they only meant to start at 60° of latitude? This is the only document to which my learned friends can refer to indicate that there is some different construction put upon North West Coast. We are supposed, says Mr Carter, to have inherited this construction, are positively excepted from the liberty of hunting, fishing and commerce stipulated in favour of the citizens of the United States for 10 years. I remind you that the 10 years clause was for visiting interior seas, creeks and rivers, and trading at places at which there was a Russian establishment. It had nothing to do with the rule of International law which permitted you to trade at places at which there was no Russian establishment.

Mr Justice Harlan. — That was restricted to a certain part of that coast.

Sir Richard Webster. — As far as the United States were concerned it was not restricted to any part at all. I am obliged to you, Sir, for putting the question to me. I asked you to remember to-day, that as between the United States and Russia this *lisière* had no existence. This *lisière* was simply for the purpose of defining a boundary between Great Britain and Russia; so far as the United States were concerned it had on existence. You will not find a trace of it in the Treaty, or a word referring to it. What happened was this : Agreeing to 54° 40', and that is the only latitude mentioned in the American Treaty, the whole of that coast was to be the subject of the Treaty. On that coast for 10 years they are to have the right of visiting the interior waters, creeks and harbours. I will perhaps trouble you to-morrow morning by reading that clause again, but there was no limit whatever.

Mr Justice Harlan. — As you so kindly respond, I am tempted to ask you again to get at your precise meaning, Article VII of the Treaty with Great Britain says :

> It is also understood that for the space of 10 years from the signature of the present Convention the vessels of the two Powers or those belonging to their respective subjects shall be mutually at liberty to frequent without any hindrance whatever all the inland seas, the gulfs, havens and creeks on the coast mentioned in Article III.

Now, when you turn back to Article III, does not that define and limit a particular part of that coast?

Sir Richard Webster. — No, I am sure it was my fault, but I was not on the British Treaty. I will undertake to demonstrate that point, but your question to me was the right of visit with regard to the United States. You will not find a single word in the United States Treaty corresponding ... that. That happens to come into the British Treaty because of the *lisière* which I will explain, but I was reading to you from Baron de Tuyll's

note which is before the British Treaty was made in 1825, and Baron de Tuyll's note was in December 1824. He there says :

It will be seen that the Aleutian Islands, the coast of Siberia and the Russian possessions in general on the North West Coast of America to 59° 30'—

that means from the North :—

are positively excepted from the liberty of hunting, fishing, and commerce stipulated in favour of citizens of the United States for ten years.

Then :

This seems to be only a natural consequence of the stipulations agreed upon for the coast of Siberia are washed by the Sea of Okhotsk, the Sea of Kamschatka and the Icy Sea and not by the South Sea, mentioned in the 1st Article of the Convention of April 5 17 1824. The Aleutian Islands are also washed by the Sea of Kamschatka or Northern Ocean. It is not the intention of Russia to impede the free navigation of the Pacific Ocean. She would be satisfied with causing to be recognized as well understood and placed beyond all manner of doubt the principle —

Now will you kindly note this :

that beyond 59°30 no foreign vessels can approach her coasts and her islands nor fish nor hunt within the distance of two marine leagues.

Not any question here of any special privilege, but an attempt to get two marine leagues fairly enough. I do ask the attention of the Tribunal to this, — my learned friends will forgive me for using the word " absurd ", I do not want to, but see what the result of their contention is. Baron de Tuyll is asked to say that from 59°30' in *this* direction you may only go within two leagues of the coast.

Mr Carter. — You mean he asks.

Sir Richard Webster. — He is asked to say and he does say by his note that above 59°30' you may go within two marine leagues of the coast. Does any man in his senses suppose that when he asked above 59°30' he merely meant to confine that from 59°30' to 60°. It is absolutely inconsistent with the position of the North-West Coast ending at 60°.

The President. — Might it not be understood in this way : All that coast of the Aleutian Peninsula and Islands, the Southern portion being settled because it was approached in that way, — as you approach 59°30' if you go beyond you go along these Islands.

Sir Richard Webster. — I have not the smallest objection to meet any argument of that kind.

The President. — Let me point out this : I am struck with it. The Aleutian Islands are also washed by the Sea of Kamschatka or Northern Ocean. If they are washed by the Sea of Kamschatka or Northern Ocean I suppose that means Behring Sea. They are washed on the southern Side by the Pacificon *that* Coast, and the Sea of Kamschatka or Northern Ocean on *that* coast. That is what we call Behring Sea. I do not understand any other possible constructionof this passage.

Sir Richard Webster. — I do not know what was in the mind of the person who framed this note which was never communicated to Great Britain (that is proved to demonstration). I am not considering whether the arguments in this note were well or ill founded, — I am not considering whether Northern Ocean meant Behring Sea or was another name for the North Pacific Ocean, but I point this out that it is conclusive against Mr Carter's contention.

The President. — The Northern Sea is used in opposition to the South Sea.

Sir Richard Webster. — I am not so sure.

The President. — It is a strange wording.

Sir Richard Webster. — I will accept it, but it does not touch my point.

Mr Carter has told you that in his opinion he is satisfied that Mr Blaine was successful in the contention that the Pacific Ocean was excluded, and he further told you that for the purpose of this Treaty North West Coast was to be confined from latitude 60° down to, 54° 40— the *lisière* : I need not mention that again. My point is that Baron de Tuyll's document is conclusive against that, because to tell us that these great nations were fighting about 30 miles of country was childish, — nobody with any knowledge of diplomacy could suggest it. The position is that the Russian Company were seeking to get the 10 years permission stopped at 59°30', not saying the words limited it, not saying the clause did not give the United States the right, but trying to get the 10 years clause stopped at that point, because the *lisière* discussion had arisen in between the time of the Treaty being agreed to in April 1824 and the date on which Baron de Tuyll's letter was written.

The President. — Will you allow me to state that I do not think that it is fair to consider as a principle of International law that there is any right (at least to-day and I do not think it ever was previously) of landing upon an unoccupied portion of any coast which belongs to another nation. There may be a question between occupation and possession.

Sir Richard Webster. — That is the ground of it.

The President. — But where there is possession if there is not actual occupation, the Sovereign nation who has that possession has the right of doing whatever she likes with it.

Sir Richard Webster. — I think for the last 20 years that certainly has been the rule; but there are plenty of indications that up till 20 or 30 years ago it was not so clearly understood.

Lord Hannen. — And even then you will find it was based on possession.

The Tribunal then adjourned till to-morrow at 11.30.

Sir Richard Webster. — Mr President, I wish as briefly as possible to conclude what I have to say on this question of the Treaties. Perhaps I ought not to pass on without saying one word more about Baron de Tuyll's note. It has nothing but a historical interest in this case; absolutely nothing, as it is not suggested that it was ever communicated to Great Britain; and I shall show you in a moment that that is placed on record at the time. But that there must have been some mistake in the language of the note to which you called my attention yesterday, is obvious if you regard the genesis and history of the document. If I am not trespassing too much on your kindness, I will ask you to turn to page [illegible] the 1st volume of the Appendix to the British Counter Case, where you will find, what I may call, the genesis or original beginning of this document. May I remind you what had happened?

The Treaty of 1824, that is the United States' Treaty, had been agreed to, but not ratified, in April 1824; it was ratified actually in January 1825. A copy of it was sent to the Company, — the Russian American Company; and it gave rise to a Conference which was held in July 1824, at which Count Nesselrode was present, and it was out of this Conference or from the proceedings at it that Baron de Tuyll's note ultimately sprung. The note was mentioned first in December 1824, and delivered in January 1825, in consequence of the discussion which had arisen at this Conference.

Now, Mr President, if you will look at page 34, paragraph 7, taking the corrected and revised translation supplied us by the United States, you will see the origin of the sentence which ultimately found its way into Baron de Tuyl's memorandum; and it shows what very little care had been taken in preparing that memorandum, and how, practically speaking, it was a document to which no substantial attention was paid. The end of paragraph 7, you will notice, reads in this way.

> Moreover, the coast of Siberia and the Aleutian Islands are not washed by the Southern Sea, if which alone mention is made in the 1st article of the Treaty, but by the Northern Ocean and the seas of Kamchatka and Okhotsk, which form no part of the Southern Sea on any known Map or in any Geography.

It is quite clear that what they were speaking of there as the Northern Ocean is the *Mer glaciale* above the Behring Straits; but when the « note explicative » came to be prepared, on the face of it it is very difficult to understand exactly what it means, but it is quite clear the person who

prepared it had not followed the actual directions of this representation from the Conference, but prepared a note embodying, as he thought, practically that which was what I may call the suggestion made by the Dignitaries.

It is curious, Mr President, to note that in the original translation sent us by the United States, if you will kindly look at the end of paragraph as it originally stood, it had been translated as " Arctic Ocean " and not " Northern Ocean. If your eye goes across the page to the bottom of the original paragraph 7 as sent to us, the translation there was—

But by the Arctic Ocean and seas of Kamschatka and Okhotsk.

And I should think it extremely probable that the Russian word would admit of either translation. But it makes no difference for my purpose. I am calling attention to the fact that this document (never communicated to Great Britain) an attempted protest by the Russian Company to try and get a restriction upon the ten years licence, assumed the form that not unnaturally caused you, Sir, a little doubt as to its meaning from the person who prepared it not having followed the actual language of the representation. As it reads in the French or the extract, I read from Mr Blaine yesterday at page 227, a full stop is put after the words 1824 and the sentence begins.

The Aleutian Islands are also washed by the sea of Kamchatka or Northern Ocean.

I pass from it with this concluding observation which is I am afraid a repetition, that the document formed no part whatever of the negotiations between Great Britain and Russia, and so far as the United States are concerned it is a distinct confirmation of what was the meaning of the language of the Treaty as it was originally understood. For this document was intended to be, and was, an attempt by the Company to get a limited and restricted meaning put upon clause IV.

Now there are only a few matters in this connection to which I need call attention, and I do so in deference to a question put to me yesterday by Mr Justice Harlan. I will ask the Tribunal to be good enough to look at the two Treaties as they are together at page 52 of the British Case. It is the most convenient form because they can then be compared without the trouble of referring to more than one book.

Mr Justice Harlan. — Before you leave that may I ask whether it appears in the Case that the terms of the Treaty of 1824 were known to Great Britain when the Treaty of 1825 was made.

Sir Richard Webster. — Yes, known and adopted by Great Britain as being a conclusive answer to the attempt that was being made by Russia to get her to agree to other terms. After the 1824 Treaty had been agreed to Russia tried to induce Great Britain to limit her right

of visiting during the term of ten years to the lisiere. Russia tried, as I will show you, by two documents, to get Great Britain to accept aless right of visiting than the United States had acquired. While that negotiation was going on the British Ministers received the American Treaty, upon which they put identically the same construction which every body else, up till this argument, has put upon it: namely that it did not limit the North West Coast to 59.30; and, in consequence, upon the ground that Great Britain could not be forced to accept less than the United States, they adopted that language without a suggestion made, or a single scintilla of a suggestion, that these rights were limited, and Great Britain was only getting a right to the North West Coast, as they are now pleased to call it, up to latitude 60, or anything else.

Mr Justice Harlan. — One other question. The United States Treaty describes it as " the Great Ocean, commonly called the Pacific Ocean or South Sea ".

Sir Richard Webster. — Quite right.

Mr Justice Harlan. — The British Treaty describes it as " any part of the Ocean commonly called the Pacific Ocean ". The French of that Treaty has the word " Grand " in it.

Sir Richard Webster. — I quite understand.

Mr Justice Harlan. — That is not material to the question I was about to ask. Have you any doubt that Great Britain intended by the Treaty of 1825 to cover precisely the same waters that the United States' Treaty of 1824 covered.

Sir Richard Webster. — Not the slightest doubt. It is my contention that Great Britain intended to get so far as coast rights were concerned, and so far as navigation and fishing rights were concerned, what the United States got.

Lord Hannen. — I think that that requires some little modification. They intended to get all they believed the American negotiators haa got. If they were mistaken as to what the American negotiators had got, that would not alter it.

Sir Richard Webster. — Not in any way. Perhaps, my Lord, I had not expressed myself accurately, but I understood the Judge to be referring to the words of the Treaty.

Mr Justice Harlan. — That was all.

Sir Richard Webster. — Not to anything behind it other wise my answer would have been different.

Lord Hannen. — They thought they were getting that which, according to their interpretation, the United States had got.

Sir Richard Webster. — That is what I meant.

Mr Justice Harlan. — The only object of my enquiry was, to as certain whether in your judgment the words in the Treaty of 1825 " in any part of the Grand Ocean commonly called the Pacific Ocean were " to receive any different interpretation from the words of similar import in the Treaty

of 1824, by reason of the fact that the words " South Sea " were not mentioned in the one of 1825.

Sir Richard Webster. — No difference at all.

[The President of the Tribunal here consulted with Lord Hannen, and Mr Justice Harlan].

Senator Morgan. — Mr President, I desire respectfully to suggest, with reference to a consultation between a portion of the members of this Tribunal, occupying more than ten or fifteen minutes, that it would be only be just to the balance of us that we should retire and have our consultation where all can be heard that is said.

Lord Hannen. — I think it right that the Senator should understand that the conversation which arose between some members of this Tribunal, arose entirely from the President having put a question to those who are nearest to him on the subject.

The President. — We should, of course, certainly adjourn for our future decision. Whatever remarks we make in exchanging points of observation which takes place between us, if it has any bearing as to our decision we would, of course, make it known in our recess when w adjourn.

Senator Morgan. — I supposed from the length of the conversation that it must necessarily have some bearing on this case, and when that is the fact I think the entire Tribunal ought to have the benefit of the observations that are exchanged between members of the Tribunal.

The President. — As we are approaching the end of our hearings altogether, perhaps it would be better not to bring in any new procedure. Personal observations exchanged between one member of the Tribunal and another are merely considered as quite informal. If there is anything in them which has any substance which may be useful to bring to notice before the final deliberation between us, you may be sure that we shall do so. These personal observations which have been exchanged were really for the private understanding of certain points between different members of the Tribunal. I myself was indoubt as to certain questions of fact, and I enquired from my neighbors what they thought of the tow translations. Perhaps, Sir Richard, you will proceed.

Sir Richard Webster. — I understood, in the answers that I gave to the learned Judge's question, that he was asking me as to what I may call the geography of the matter, — as to whether I meant to draw any distinction between " the part of the Ocean commonly called the Pacific Ocean " and, " the part of the Great Ocean commonly called the Pacific Ocean or South Sea " in the 1st Article of the United States' Treaty. It was in that sense, and in that sense only, that I answered the question. If there was something behind that I do not understand, I am quite sure that the learned Judge will let me know. That is how I understood the question put, and that is how I answered it.

Now I will ask the Tribunal to look at the Treaty. I care not whether I work by the French or the English text myself; but I think I had better take the English so that all the Members of the Tribunal will follow me more easily. If they will be kind enough to look at page 52 of the British Case, there they will see an English version of the United States' Treaty sufficiently accurate for my purpose, — at any rate, sufficiently accurate to enable my point to be made clear. On the next page, you will find the British Treaty. It is a mistake to suppose that either Nation thought they were getting any grant under Article I, — and I am confining my observations now to the United States' Treaty : whether it be international law or not, now, both Nations in the years 1824 and 1825 were contending, and contended for long after that time, that by international law the right existed to land on unoccupied coasts; and it is not necessary to go further with the language of this Article 1 to enable one to see it. It says :

> It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following Articles.

That was an agreement that the interference attempted by Russia over the whole area as to which it had been attempted, should be withdrown and should be no longer persisted in. It was no grant; it was no permission — it was, in favor of the United States, a withdrawal of the claims of Russia put forward by the Ukase of 1821, objected to by the protest of the United States, no longer continued after the year 1824.

Now Mr President will you look at the words of the next Article.

The President. — Do you believe that this first Article implied that Russia had a property on the inhabited coasts?

Sir Richard Webster. — I think the first Article implied that the United States did not care to dispute Russia's title to the coasts, because you will observe if I may say so — I am a little anticipating — that by the third Article they agreed to make no settlement north of 50° 40'. Of course the United States knew perfectly well that they could not determine the question between Russia and other nations; but so far as the United States were concerned they did not care about raising the question of whether Russia's rights to the coast above 54° 40' could be disputed. That is what my understanding of the Articles is.

The President. — You would construe that as recognizing an exclusive right of Russia to take possession, rather than an actual recognition of the actual property of Russia?

Sir Richard Webster. — That I believe is the proper construction of this Article — recognizing a right of Russia without let or hindrance — by the United States, to take possession of that coast, without conside-

ring whether her possession up to that time was complete; and reserving to the United States the right by international law, which was then believed to exist, that in the absence of possession being taken — in the absence of Russian establishments — there was a right of trading with the nations, and, if necessary of landing for the purpose of trading. It was a recognition of rights and not a grant of any fresh rights whatever. It was in consequence of the action of Russia in 1821 necessitating protests by the United States, and necessitating the withdrawal by Russia of the claims which she had set up which would have interfered with the United States rights.

Now if you will let me read the second Article, you will observe that my first point comes out with greater clearness still there. It says :

> With a view of preventing the rights of navigation and of fishing, exercised upon the Great Ocean by the citizens and subjects of the High Contracting Powers, from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian Establishment, without the permission of the Governor or Commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any Establishment of the United States upon the north-west coast.

Now you will observe, Sir, from the point of view of future establishments, no fresh establishments were to be made by Russia south of 54° 40' — no fresh establishments were to be made by the United States north of 54° 40'. This clause shows that the rights of navigation and visit, (which were recognized as extending to unoccupied coasts), were not to be exercised where there was a Russian establishment, or United States establishment without communication with the Commandant of the respective Governments; and is inconsistent, as I shall show you in a moment, with any idea of this being limited to 54° 40' or 60", it being necessary that the right should extend all the way round that territory, and should be exercised, subject to the control of Article II all the way round that, territory north of 54° 40' right up to the Behring Straits which had been included in the Ukase.

Now will you look at Article III? It says :

> " It is, moreover, agreed that hereafter there shall not be formed by the citizens of the United States, or under the authority of the said States, any Establishment upon the north-west coast of America, nor in any of the islands adjacent, to the north of 54° 40' of north latitude.

Now do the United States Counsel contend that the north-west coast was limited in the Article? There was a vast extent of coast running away to the west of where you find there the pink colour, right down to the Aleutian Islands. According to the contention of Mr Carter " north west coast ", where it occurs in this Treaty, lies between latitude 60° and latitude, 54° 40'. Now I ask you whether this contention, never raised by Russia, never suggested by Russia, is to prevail in the face of that Article III where there is a prohibition against the United States for esta-

blishing a settlement on the north-west coast of America north of 54° 40′? What does that mean? That for good consideration, the United States agreed that they would not make fresh establishments from north of 54°40′ right up to Behrings Straits, and, for that matter, beyond. It is not important for my purpose, because so far as we are now considering, up to Behring Straits is far enough.

The President. — Do you believe by that Article that the United States forfeited the right to settle on the more southern Islands of the Aleutian group?

Sir Richard Webster. — Certainly.

The President. — Yet they are not north of 54°.

Sir Richard Webster. — That is exactly what I desire to bring out. They were dealing with the coast line, and they were saying "There shall be a line drawn upon that coast at 54°40′. They meant the United States settlement to stop at 54°,40 and the Russian settlement to stop at the same line. That was the dividing point for them.

The President. — They speak of the Islands on that coast.

Sir Richard Webster. — That is the observation I had in my mind. However, it is unimportant — *that* is why 54° 40′ came in.

The President. — It is not quite so unimportant, because your interpretation of this Article has to be taken together with your interpretation of what you said yesterday about the 59° 30′ parallel, when you said it could not certainly apply to the 30 miles remaining between 59° 30′ and 60°.

Sir Richard Webster. — No.

The President. — I believe in the same way as you said to-day, that the people who made these Treaties were thinking of the coast line, and considered that going, say, from San Francisco all along the coast to Kadiak and the Unalaskan part they went on going north as it may be that they meant when they spoke of doing nothing above 59° 30′.

Sir Richard Webster. — They may not have remembered that this peak came down so far. We do not really know whether the map was correctly plotted at that time.

The President. — That is how you interpret both cases?

Sir Richard Webster. — Certainly.

The President. — And the one you mentioned yesterday.

Sir Richard Webster. — But surely, if I may be allowed to say so — I do not want to justify myself — it is the strougest argument in support of what I said yesterday, that it was ridiculous, of course, to suggest that they drew any distinction between 59° 40′ and 60° for this purpose. 59° 40′ and 60° for the purpose of a dividing line were practically the same from the point of view of the coast line.

Mr Justice Harlan. — Does it anywhere appear from the correspondence of either of the three Governments, that either Great Britain or America disputed the right of Russia to the Aleutians Islands or to any parts of of the coast north of 59° 30′ or 60°?

Sir Richard Webster. — I do not think it does except in this sense, Judge — that I think that in all probability there was not the amount of agreement as to what possession had, in fact, been taken by Russia; but I agree with the Attorney General that, from the British point of view, they were content to stop at 54° 40' in the sense of 54° 40' used by the President but a few moments ago.

The President. — You would not interpret all this Treaty as a delimitation of territory actually occupied, but rather of what you call today the sphere of influence, — that is the right of taking possession.

Sir Richard Webster. — Yes, I ought to say, if I was concerned to discuss it, in the beginning of the negotiation Mr Adams distinctly disputed it; but I was rather looking at the ultimate result of the negotiations than the preliminary discussion which seemed of less importance.

Now, I desire to call the attention of the Tribunal to Article IV.

> It is, nevertheless, understood that, during a term of ten years, counting from the signature of the present Convention, the ships of both Powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbours, and creeks upon the coast mentioned in the preceding Article, for the purpose of fishing and trading with the natives of the country.

That was independent, so to speak, of what I may call the general right of trading with natives on unoccupied coasts. It was something which would apply to what may be called interior seas and waters of the territory in future to be recognized as Russian as distinguished from the United States.

Now, I desire, to the best of my power, to avoid repetition; but with reference to what you have been good enough to put to me, showing you were kindly appreciating my argument yesterday, what reason can be given for saying that that privilege stopped at latitude 60° — there is not a vestige of a trace of a suggestion of the kind in the correspondence between Russia and America, but for the purpose of this case to support an argument of Mr Blaine which had better, when examined, have been abandoned, with all respect to my learned friend, Mr Carter, — he puts it in his written argument, and says that the Northwest Coast is, because he says it, to be construed as being from 60° to latitude 54°, and so on, further south. May I ask to read one document which shows how Russia, at any rate, would never have attempted to put that construction on the language! It is not a diplomatic document, but still it is of equal importance because it emanated from Count Nesselrode. I mention it for the purpose of showing that our contention is no afterthought; but this coast is referred to by Russia with the meaning we put upon it and not the meaning that the United States put upon it. If you turn to page 30 of that same book, the 1st Appendix to the Counter Case, which you were good enough to refer to when I was speaking of Baron de Tuylls memoradum, you will find Count Nesselrode's letter of the 11th of April, 1823, which is written seven days after the Treaty was agreed and signed

in the terms I read, — not ratified, but signed. It was done at St Petersburgh on the 5th of April, 1824.

Now the letter of the 11th of April, 1824 (and I read from the revised translation), at page 30 of Vol. I Appendix to British Counter Case, about a dozen lines below the break which begins "having thus denoted", with reference to Article III of the American Treaty it is said : —

> In Article III the United States recognize the sovereign power of Russia over the western coast of America, from the Polar Seas to 54°40' of north latitude.

Sir, would you will glance once more at the language of Article 3 ? "Any Establishment upon the Northwest Coast of America"; my learned friend, Mr Carter, is driven from the necessities of his position to say that in Article III the "Northwest coast of America" means from 60° to 54°40' ; and Count Nesselrode speaking of it a few days afterwards says that it went to the Polar Seas. It is not too much to say that this contention could not have been made by Russia, — could not have been made by anyone who was not driven to the stress of supporting an untenable position taken up by Mr Blaine in order to support a proposition, — the meaning of which the words do not permit of. You will not find any dispute about the northern boundary of the Russian possessions ; and it is the key to the whole of this correspondence and this construction, that the United States were only anxious about the southern boundary and cared not a bit about the northern. Therefore, you find in this Treaty no trace of 59°, or 60°, or anything that corresponds to it.

The President. — Except for reserving the right of free navigation and trade on unoccupied points, which I would call rather a conventional arrangement than international law.

Sir Richard Webster. — And you observe, from the [illegible] view of the dividing line, it equally applies north and south of 54° 40'. 59°30' or 60° does not enter into this Treaty at all, and there is not one word on which my learned friends can hang their point.

I am glad to think that my points come out clearly as I go along, and not at too great length.

The President. — Might I beg to ask incidentally, what is the position of the United States as to the double translation of these documents published in the first Appendix to the British Counter Case? You see there are two translations.

Sir Richard Webster. — The first was the original one sent us by the United States. The revised translation is also sent us by the United States. You will disregard the lefthand column altogether.

General Foster. — Of course, Mr President, you must disregard it, because it is not now in the Case.

Sir Richard Webster. — We were obliged to do it — the United States admit we were, — to call attention to the inaccurate translation. We could not help doing it; but we printed them, so that the eye might see where the inaccuracy occurred, — both the original and the revised.

Now, would you be good enough to turn back to page 11 (App. I B. C.C) of that Appendix, and you will there find the explanation.

> The lefthand column contains the translations originally furnished by the United States' Governments in Volume I of the Appendix to their Case. In the right-hand column revised translations are given. N^os^ 1 to 10, 12 and 15 having been withdrawn by the United States, the revised translations of these documents have been made for Her Majesty's Government from the *fac-similes* of the original Russian text annexed to the Case of the United States. Of the remainder, namely N^os^ 11, 13, 14, and 16 to 31, the amended versions, recently supplied by the United States, have been adopted. Where any material differences between the original and revised translations occur the passages have been underlined, with the addition of brackets in the case of interpolations.

For my purpose, I accept the position taken by my learned friends; and I refer entirely to their revised translation.

Now, Sir, may I resume the thread of my observations; that, with reference to the Treaty itself, there is not a word in it upon which the contention of the United States now made can be founded. But it may be said, though that may be perfectly true, Great Britain understood it differently, — that Great Britain understood " Northwest coast " in the limited sense that the United States are contending for, " and therefore, we shall rely upon what Great Britain thought".

Here I would remind the Tribunal of my learned friend Mr Carter's answer to Lord Hannen to be found at page 359 of the revised note. I need not trouble the Tribunal to look at it because I mentioned it yesterday. Mr Carter was arguing, that because we had adopted the language of the 1st Article of the American Treaty, we must be taken to have inherited its limited meaning; and Lord Hannen puts this to Mr Carter :

> Would you say the English Government was bound by the interpretation which you say had been but upon it by the Russian and American Governments if the correspondence between the English Government and the Russian Government shewed that they understood the words ' Pacific Ocean ' in a different sense?

And my learned friend, Mr Carter says :

> No, my Lord, I would not in that case.

And, of course, one would have expected Mr Carter to have made that answer.

Now I will complete what I have to say about these Treaties by showing that beyond all question the British Government did not understand either Pacific Ocean as excluding Behring Sea, or North-West Coast as limited to what was south of latitude 60, and will the Court be good enough to take the volume I had yesterday, Appendix 2 to the British Case, and let me put two letters which, in my submission, put this matter beyond the slightest question, and to which I crave the attention of my learned friend, Mr Phelps, when he comes to reply. You will remember, Mr President, that I yesterday called attention to page 63 where the words occur. " Along the whole extent of the Pacific Ocean compre-

hending the sea within Behring Straits ". It is put both in French and English.

Mr Justice Harlan. — The value of that depends on what he meant by the words " Pacific Ocean " in that first article.

Sir Richard Webster.— He must have meant Behring Sea. He could not have meant anything else, for it is the right of free navigation along the whole extent of the Pacific Ocean comprehending the sea within Behring Straits.

Mr Justice Harlan. — Need he have referred to it if, as both sides admit, Russia had no purpose to exclude either the United States or Great Britain from the open waters of Behring Sea.

Sir Richard Webster. — He must have referred to it for in any contention the 100 miles from Asia and from Alaska and from Siberia would have overlapped long below.

Mr Justice Harlan. — He specifically refers to Behring Straits for that reason.

Sir Richard Webster. — Everybody agrees that the 100 miles would have excluded from the coast on the east side — and the coast on the west side — ships coming within 200 miles of Behring Straits and therefore from the point of view of this letter he is speaking of the navigation of something which will take him up to Behring Straits. What does he call that — the Pacific Ocean? If it can be suggested against me, — if you could suggest that the 200 miles from Behring Straits would have reached down south of the Aleutian Islands, there might be some thing in the suggestion but the fact that the person who penned this document is speaking of the Pacific Ocean as taking him up to Behring Straits shows conclusively in his mind he was arguing about the space of water which abutted so to speak upon Behring Straits, the 100 miles having disappeared altogether. May I trouble you kindly to refer to it. They actually speak in the same Article of two marine leagues thus at p. 63, App. II, B. C. we read.

> It being well understood that the said right of fishery shall not be exercised by the subjects of either of the two Powers nearer than two marine leagues from the respective possessions of the other.

And, therefore, it contemplated going quite close up to the shore of Behring Straits within two marine leagues. Again I may be met with this: That is what Great Britain said; is it what Russia said and I will ask Mr Justice Harlan to look at page 69. I will translate (and the President will correct me) the opening words of Article III at page 69 of the counter-draft of the Russian Plenipotentiaries, " that in the possessions of the two Powers which are designated or described in the preceding Articles, and particularly so far as 59°30′ of North latitude, but not further, the respective vessels shall have the right of visiting for ten years. " Therefore Russia was asking not that Northwest Coast should have a different meaning, but that there should be a special limitation of the right

of visit by Great Britain not above 59° 30′ for the ten years. They sought to limit the ten year period of visit to this very coast that my learned friend Mr Carter has been speaking of, not on the ground that it was called Northwest Coast. Nothing of the kind. They knew perfectly well that Northwest Coast meant a great deal more than that. They sought to put in terms a prohibition against visit beyond that point.

The President. — That excluded, of course, visiting Kadiak and Unalaska.

Sir Richard Webster. — It excluded everything.

The President. — I thought it was more south.

Sir Richard Webster. — Yes, I think it is a little more south.

The President. — Yet you consider that part as excluded?

Sir Richard Webster. — Unquestionably from the point of view they were bargaining Russia tried to limit it to that latitude, and they had a reason for it, because between Great Britain and Russia there was a discussion about the *lisière* which only came into existence from the point of view of the British Treaty. It has no relation to the United States Treaty at all.

Now let me read Article V (see p. 69, App. II, B. C.):

> The High Contracting Powers stipulate morover that their respective subjects shall freely navigate on the whole extent of the Pacific Ocean as much to the north as to the south without any hindrance, and that they shall enjoy the right of fishing on the high sea, but that this right shall not be exercised within a distance of two marine leagues from the coasts or possessions, be they Russian or be they British.

Now again I ask, what ground is there for suggesting that the coasts and possessions of Russia are to be limited to 60° or that the Pacific Ocean does not go right up to Behring Straits? What argument can be adduced in support of such contention except the assertion of Counsel, which is not argument at all for this purpose.

Senator Morgan. — Is that Treaty now in force?

Sir Richard Webster. — This is not the Treaty: It is the Russian *projet*. I am endeavoring to show that Russia understood Northwest Coast and Pacific Ocean through the whole of this in exactly the same sense that Great Britain understood it. Article VI is, the Russian Emperor wishing to give more proof of his regard for the interests of the subjects of His Britannic Majesty, and to give all success to useful enterprises which result from the discovery of the Northwest Passage of the Continent of America, consents that this freedom of navigation, mentioned in the preceding article, extends under the same conditions *au détroit de Behring*, and the sea situate to the north of it. Now, I ask Mr Justice Harlan's kind consideration to this. The 100 miles has disappeared in this document. There is not a trace of the 100 miles, and they themselves proposed two marine leagues, and they speak of the right of navigation and of fishing, which is to extend within two marine leagues of the coast, as going right

up to Behring Straits; and yet in the face of this the successors in title of Russia allege a right to say that the navigation at this time was understood by Great Britain as meaning to be confined to that which was south of the Aleutian Islands, and not to extend to these thousands of miles of water which extended from the Aleutian Islands up to Behring Straits.

Then Article VII provides that the Russian vessels and the British vessels navigating in the Pacific Ocean and the sea above indicated, that is the Arctic Ocean, as well when they are driven by tempests or by damage had taken refuge in the respective ports of the High Contracting Parties. In the Northern Ocean and Pacific Ocean they might get round to British possessions, and therefore up to the latest date Russia (and this points my observation) is seeking to get Great Britain to agree to the ten years clause being limited to the *lisière* with regard to all the Articles — the Pacific Ocean and the Northwestern Coast — in the meaning which would include the coast up to Behring Sea.

Now Mr Justice Harlan put a question, was the Treaty communicated to Great Britain before the other Treaty was signedwill you be good enough to turn to page 72 of the same book (App II B. C) where will be found Mr George Canning's communication with regard to the American Treaty, and that brings out in the clearest possible relief the arguments which I have been endeavouring to put before the Tribunal.

Article IV of the United States Treaty is thus summarized — I had better read the summary of both III and IV.

The third Article fixes the boundary line at 54° north of which the United States are not to form establishments and south of which Russia cannot advance.

There is no reference to 60° or any northern boundary or any southern boundary.

The fourth Article allows free entrance to both parties for ten years into all the gulfs, harbours etc. of each for the purposes of fishing and trading with the natives.

The contention of my learned friends now is that Great Britain only thonght that under the words " North-west coast " in the Article of the British Treaty they were getting the right to fish up to latitude 60°. Now what does Mr Canning say? It was present to his mind — because as I have shown to you but a few moments ago, Russia had been trying to get those things agreed toby Great Britain. He writes to Count Lieven who was the Russian Minister I believe in England.

I cannot refrain from sending to your Excellency the inclosed extract from an American newspaper, by which you will see that I did not exaggerate what I stated to you, as the American construction of the convention signed at St. Petersburgh.

It is to this construction that I referred, when I claimed for England (as justly quoted by Count Nesselrode) whatever was granted to other nations. No limitations here of 59°.

There never had been any attempt to get Great Britain to limit the

right of navigation or fishing except to the twoleagues which is mentioned before. But with regard to this point of the north-coast coast there had been the distinct attempt to get her to limit her 10 years clause to the very strip which Mr Carter now suggests she agreed to limit it to.

Mr Justice Harlan. — What you read is a newspaper account of the Treaty. What you want I think is the letter of Mr. Addington on page 29.

Sir Richard Webster. — For my particular purpose I do not want anything more than that summary. It is a true summary. It makes no difference for my purpose.

Mr Justice Harlan. — I thought you were reading it to show the British knew of the Treaty.

Sir Richard Webster. — Well so I think they had as a matter of fact.

Mr. Justice Harlan. — No they did not get it till the letter of Mr Addington which shows he transmitted it I think to Mr Canning.

Sir Richard Webster. — You are right. I was perhaps endeavouring to take it a little more shortly than I need; but my argument is as strong whether it is a communication through a newspaper or any other channel. My point is that Great Britain knew the terms of the Treaty, and the moment the terms of the Treaty between the United States and Russia were called to Mr Canning's attention, Mr Canning said, "No limitation here of 59°," and demanded for Great Britain that which Russia had given to the United States; and yet, Sir, in the face of this you are solemnly asked to-day by written and oral argument to say that Great Britain acquiesced in the claim by Russia that the Pacific Ocean was to be excluded, and the north-west coast was to be confined between latitude 60° and latitude 54°.

Sir I cannot allow myself to occupy your time by reading that which only brings this out over and over again, but there is one sentence at the bottom of page 73 :

> For reasons of the same nature —
>
> (This is in Mr George Canning's letter to Mr Stratford Canning).
>
> we cannot consent that the liberty of navigation through Behring Straits should be stated in the treaty as a boon from Russia.

And the last sentence is —

> No specification of this sort is found in the Convention with the United States of America, and yet it cannot be doubted that the Americans consider themselves as secured in the right of navigating Behring Straits and the Sea beyond them.

Is that consistent with Behring Sea being excluded from the operations of the Treaty of 1824?

Lastly, the actual language of the Treaty was sent to Mr Canning in

Mr Addington's letter of the 29th of January, which is to be found on page 75, wherein it is said to be —

For defining the extent of the rights of either nation to the navigation of the Northern Pacific, and their traffic and intercourse with the north-western coast of America.

But, perhaps, I ought to have read one other paragraph first, on page 74.

Perhaps the simplest course after all will be to substitute, for all that part of the "projet" and "counter-projet" which relates to maritime rights and to navigation, the first two Articles of the Convention already concluded by the Court of St Petersburgh with the United States of America, in the order in which they stand in that Convention.

Then :

The uniformity of stipulations *in pari materiâ* gives clearness and force to both arrangements, and will establish that footing of equality between the several Contracting Parties which it is most desirable should exist between three Powers whose interests come so nearly in contact with each other in a part of the globe in which no other Power is concerned.

And then, on page 81, is the letter of Mr Stratford Canning to Mr George Canning from St Petersburgh; and here, Sir, is the answer to the suggestion that we inherited this construction in 1824, which never saw the light until Mr Blaine, or some of his advisers, evolved it in the year 1890.

Referring to the American Treaty I am assured, as well by Count Nesselrode as by Mr Middleton, that the ratification of that instrument was not accompanied with any explanations calculated to modify or affect in any way the force and meaning of its Articles. But I understand that, at the close of the negotiation of that Treaty, a Protocol, intended by the Russians to fix more specifically the limitations of the right of trading

(that was perfectly true, because it referred to the 10 years' clause)

with their possessions, and understood by the American envoy as having no such effect, was drawn up and signed by both parties. No reference whatever was made to this paper by the Russian Plenipotentiaries in the course of my negotiation with them; and you are aware, Sir, that the Articles of the Convention which I concluded depend for their force entirely on the general acceptation of the terms in which they are expressed.

Will you kindly turn now to the British Treaty on page 53 of the British Case, and I will endeavor to take it as shortly as possible. It will not be waste of time to run through it without reading the articles at length. The scheme of that Treaty is of some little importance in order to complete my argument upon the point. Article I corresponds with, and I say is the same as, Article II in the United States Treaty. Articles III and IV find no place in the United States Treaty. They relate to the *lisière*. It is not necessary that I should do more than explain in one sentence what it was, that my story may be complete. It was necessary to determine a land boundary between British America and Alaska, and accordingly

Articles III and IV relate solely to what that land boundary should be. Article V corresponds with Article III of the United States Treaty. It is an agreement between Great Britain and Russia as the previous agreement existed between the United States and Russia, that no establishment should be formed by Great Britain north of the line of delimitation. Then Article VI refers to the rivers crossing the *lisière*. It was necessary because it finds no place in the United States Treaty, because there was no *lisière*.

It is understood that the subjects of His Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the continent shall for ever enjoy the right of navigating freely, and without any hindrance whatever, all the rivers and streams which, in their course towards the Pacific Ocean, may cross the line of demarcation upon the line of coast described in Article III of the present Convention.

Perhaps, it would not be inconvenient if I read to you the French version of that Treaty, which you will find — and you can put them side by side — at the end of the B. C. Appendix, Volume 2, Part III to which I have been just referring.

The President. — It would be better to look at the French original, as this was a translation. What you have just read is the English translation.

Sir Richard Webster. — You are right, Sir. In both cases the originals of this Treaty were in French. What General Foster said later on about the 1867 Treaty did not apply to the one of 1824.

If you would look if you please, Sir, at Article VI, on page 3, of part 2, you will find this.

Mr Justice Harlan.. — It is in the Appendix to the American Case, volume I, pages 39 and 40.

Sir Richard Webster. — Quite true. It is this :

Il est entendu que les sujets de Sa Majesté Britannique, de quelque côté qu'ils arrivent, soit de l'Océan soit de l'intérieur du continent, jouiront à perpétuité du droit de naviguer librement et sans entrave quelconque, sur tous les fleuves et rivières qui, dans leurs cours vers la mer Pacifique, traverseront la ligne de démarcation sur la lisière de la côte indiquée dans l'Article III de la présente Convention.

Therefore, when you look at the original, there is not any doubt about it at all, because they refer, most properly, to the " lisière de la côte " ; and if you will turn back to Article III you will find there the lisiere described.

Mr Justice Harlan. — What are the English words in Article VI corresponding to lisière?

Sir Richard Webster. — I will read it :

May cross the line of demarcation upon the line of coast.

The expression " line of coast " is not the proper translation — it ought to be " *strip* of coast ". " Strip " is the correct translation of

"lisière", if I may be permitted to say so Mr President, and no doubt if I am wrong you will correct me. "Lisière" is "selvage" — "strip" — like the edge of cloth — "border".

Lord Hannen. — You might suggest yet another word — "margin".

Sir Richard Webster. — I will read now Article VII, which corresponds with the American Article IV.

It is also understood that, for the space of ten years from the signature of the present Convention, the vessels of the two Powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in Article III, for the purposes of fishing and of trading with the natives.

Not the *lisière*; and if you look at the French, which is perfectly plain description, the words are :

Les golfes, havres et criques sur la côte mentionnée dans l'Article III————

Without any reference to "lisière" at all. The only feeling I have in dealing with this matter, is that it is a little cruel to my friends to be exposing the impossibility of maintaining the argument by which Mr Carter has said, in his opinion, Mr Blaine, to his entire satisfaction was completely successful in showing that Behring Sea was excluded from the Pacific Ocean, and that Northwest coast had this meaning by those treaties.

Mr Justice Harlan. — Would you turn to Article III and tell me what is the "coast" mentioned there.

Sir Richard Webster. — Yes. The coast mentioned in Article III, is —

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west.

That is from about 54°40' right up to the point where 141° West longitude strikes the Arctic Ocean, and I submit there is no question about it.

The line of demarcation runs behind the lisière until it gets to Mount St. Elias, and then it goes straight up.

Mr Justice Harlan. — What do you say is the point of the shore referred to as the "coast" in Article VII?

Sir Richard Webster. — The "coast" is the whole of the coast up to Behring Straits.

Mr Justice Harlan. — Up to Behring Straits?

Sir Richard Webster. — The line of demarcation is a complete line. It divides the British possessions from the Russian possessions; it has nothing to do with the lisière.

Now I will read the translation, and perhaps, Mr President, you will kindly follow it in French. I am reading from page 54 of the British Case. It is not my translation but I believe it is correct. It is this :

The line of demarcation between the possessions of the High Contracting Parties upon the coast of the continent and the islands of America to the north-west, shall be drawn in the manner following :

Commencing from the southernmost part of the island called Prince of Wales' Island, which point lies in the parallel of 54° 40' north latitude, and between the 131st and the 133rd degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast, as far has the point of intersection of the 141st degree of west longitude " of the same meridian "; and, finally, from the said point of intersection, the said meridian-line of the 141st degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British possessions on the continent of America to the north-west.

I submit (remembering that the line of demarcation was to be complete with reference to the coast referred to as the north-west coast of the continent, and the Islands of America to the north west), that nobody who can take an impartial view of this matter can come to any other conclusion than that the coast referred to in Article VII is the whole coast; and when we remember that in the United States the expression *lisiere* does not occur at all, and that Article III of the United States treaty speaks of the north-west coast of America north of 54° 40', and that I am justified in saying that Mr George Canning believed that he was getting the same for Great Britain as the United States had got from Russia there is not any answer, at any rate, apparent (unless I have made some grave blunder) to the contention that the right of Great Britain to visit, during ten years, inland creeks, and harbours, and to visit for the purpose of navigation and fishing the seas which washed the American coasts extended right away from 54° 40' up to the point to which I have called attention.

Now it is not necessary for me, unless my friends tell me so, to refer to the other Articles of the Treaty. They relate to the sale of spirits, and to Sitka, and New Archangel, and to other matters, which are specially referred to, but have no bearing on the discussion which is now before you.

There are two matters in this connection which have not received notice, and to which I ought to direct the attention of the Tribunal, not in any way as qualifying or even as strengthening what in my submission to this Court is so absolutely plain, but I refer to it in order that it may not be thought that I have overlooked my friend, Mr Carter's, point. Mr Carter said, for the purposes of this Treaty, they were not concerned with what the previous correspondence had been. They said " the Ocean commonly called the Pacific Ocean " — I think I have quoted the language quite correctly — and accordingly they meant by that " south of the Aleutian Islands ". It would have been a little satisfactory, at any rate to us who have to answer my friend, if he had gone on and told us where he got the common reputation of Pacific Ocean to be that south of the Aleutian Islands; but, at any rate, I will put the material before the Court. I must not read it, because it would be simply a waste of time, in one sense — not a waste of time as far as the information is concerned, but it would be trespassing on the indulgence of the Court to read it. There are several

collections of what I may call information of considerable use, if this matter came to be discussed. I call attention first to the 1st volume of the Appendix to the Counter Case, because it happens to be most complete, and will ask you to look at page 88. Now there you will find, Mr President, that which we believe to be the most complete record (and they have been selected without any regard to taking anything that is for or against us) of the maps and geographies which have ever been collected in connexion with this matter. The list sent by Mr Blaine to Lord Salisbury was found, when it came to be examined very deficient indeed. This is very much larger, and it includes a great many more; and Mr Blaine's list did not call attention to the way in which the names were used.

Would the Tribunal kindly look at page 88 of App. I to British Counter Case. In the margin there you will find the date put of every reference made. I will read down the dates first. 1795; 1802; 1803; 1804; 1808; 1815; 1819; 1822; 1823; 1826; showing that they are pretty contemporaneous. Now, Mr President, let me read you a specimen of two or three of them :

„ Kamschatka Sea is a large branch of the Oriental or North Pacific Ocean. „
„ Behring's Straits, which is the passage from the North Pacific Ocean to the Arctic Sea. „
„ Beering's Island. An island in the Pacific Ocean. „
„ Kamschatka. Bounded east and south by Pacific. „

That is a most important matter :

Bounded east and south by Pacific.

Then it says :

Kamschatka. Bounded on the North by the country of the Koriacs, on the east and south by the North Pacific Ocean and on the west by the Sea of Okotsk.
Behring's Island. In the North Pacific Ocean.
Behring's Island. An island in the North Pacific Ocean.
Kamschatka. River, which runs into the North Pacific Ocean.

The Kamschatka River runs into Behring Sea North of the Commander Islands. Then there is the date of 1819. I have not read the dates against each. I might have done it perhaps in that way. Then it goes on :

„ Pacific Ocean considered as the boundary of the Russian Empire, washes the shores of the Government of Irkutsk, from Tschukotsky Noss, or Cook's Straits, to the frontiers of China; or, in other words, from the mouth of the River Aimakan that is, from 65° to 45° North latitude. It is divided into two great parts. That lying eastwards from Kamschatka, between Siberia and America, is eminently styled the Eastern, or Pacific Ocean; that on the west side, from Kamschatka, between Siberia, the Chinese, Mongolia, and the Kurile Islands, is called the Sea of Okhotsk. From the different places it touches it assumes different names, e. g., from the place where the River Anadyr falls into it, it is called the Sea of Anadyr, and above Kamschatka the Sea of Kamschatka; and the bay between the districts of Okhotsk and Kamschatka, is called the Sea of Okhotsk, the upper part of which

is termed Penjinskoye More, that is, the Penjinskian Sea, as it approaches the mouth of the River Penjine."

I might occupy a great deal more time than the importance of the question merits, in going through these documents. If you will turn to pages 92 to 105 you will find a consecutive record of maps, without selection, from which it will appear that though at times portions of the North Pacific were called, and properly called, Beaver Sea, Behring Sea, Sea of Kamchatka, and some other names, that in the vast majority of cases the common appellation given to the whole district of the ocean right up to the Behring Straits is Pacific Ocean.

Mr Justice Harlan. — Sir Richard, do you regard the phrases "North Pacific Ocean" and "Pacific Ocean", as identical all through that volume?

Sir Richard Webster. — I think, Sir, that "North Pacific Ocean" is for this purpose identical with "Pacific Ocean": "South Sea" was another name for it for a particular reason. South Pacific Ocean would really begin south of the equator. I have not studied the actual point where South Pacific would end, but I understand that North Pacific Ocean merely means the northern part of the Pacific Ocean.

Mr Justice Harlan. — I have seen a good many maps on which the waters south of the Aleutian Islands are marked distinctly "North Pacific Ocean", while the waters north of them were marked sometimes Sea of Kamtchatka, and sometimes Behring Sea. It is quite true, as you say, that there are maps both ways.

Sir Richard Webster. — There is a large number of maps on which Pacific Ocean appears as going over the whole, and Behring Sea appears, above it, in small type as being the sea which was what I may call the part of the Pacific Ocean that had got that name.

You will find a map of the North Pacific Ocean below the Aleutian Islands hanging behind you, and Behring Sea put in its place. At any rate, it should not be thought that we have created evidence for ourselves. It is known all over the world that particular seas and parts of the oceans get local names; but for this purpose we have got to consider what the parties meant when they wrote it in that treaty. I trust I have not failed in bringing to the mind of the court the demonstration that they did mean the part of the Ocean right up to Behring Straits.

Lord Hannen. — To what extent do you say this list is exhaustive?

Sir Richard Webster. — As far as the maps are concerned, my Lord, I believe it contains every known map that could be found.

Mr Justice Harlan. — Oh, no; there are a great many of the maps not given. Mr Blaine, in his correspondence with Lord Salisbury, gives 105 maps.

Sir Richard Webster. — There are 136 in this list, Sir; but not all of Mr Blaine's are included because later Editions were inserted.

Mr Justice Harlan. — More than half of Mr Blaine's I think, are not mentioned in your list.

Sir Richard Webster. — I do not think that is correct, Judge.

Mr Justice Harlan. — I may be wrong.

Sir Richard Webster. — I do not think that is correct; but I really have not examined it personally.

Lord Hannen. — I wanted to know because I find — if you are right, you know — that down to the year 1825, according to your statement, the Behring Sea is never mentioned. You stated that this is exhaustive. Behring Sea is not mentioned in any of these geographies.

Sir Richard Webster. — It would perhaps be convenient to say a word or two about the maps themselves.

Lord Hannen. — These are all the geographies?

Sir Richard Webster. — I believe, my Lord, that the list of geographies has been made as chronologically accurate as it could be. I do not pretend to say we found every book that exists, because it is not possible; but at any rate it was endeavered to be done impartially; and so far as we could, they were taken from the books which could be found.

Lord Hannen. — Take the third: "Behring Island, an island in the Pacific Ocean". Then there is added "Behring Island in the Behring Sea".

Sir Richard Webster. — That is the first name given to it.

Lord Hannen. — That is added?

Sir Richard Webster. — That is our commentary, put in brackets. It is the first time Behring Island was mentioned, and we desired to show where it was.

Mr Justice Harlan. — Behring Island is to the left of the Copper Island.

Sir Richard Webster. — Mr President, I had not intended to trouble you with the maps; but I should like to pick out a few as I pass, in order to shew you the importance of them. Of course in these early days people naturally borrowed from one another. There was not so much known about the maps, and you would not expect it. If you will kindly look, Sir, at the earliest on page 92.

A general chart, exhibiting the discoveries made by Captain James Cook, etc, This is the original of the chart in the 8^vo^ edition. Behring Sea appears without names, though Olutarskoi sea, Beaver Sea, Gulf of Anidir, Shoal Water, Bristol Bay, appear as local names of equal rank. The three first close in to the Asiatic coast.
Behring Strait, North Pacific Ocean.

Then at number 4.

Chart of the N. W. Coast of America and the N. E. Coast of Asia. Explored in the years 1778 and 1779. Prepared by Lieut. Roberts under the immediate inspection of Captain Cook. Published by W. Faden, Charing Cross, July 24, 1784.
Behring Sea named *Sea of Kamchatka.*
Beaver Sea close in to shore of *Kamchatka.*
Sea of Okotsk, equivalent in rank to *Sea of Kamchatka.*
Gulf of Anadyr, Bristol Bay.
Northern Part of Pacific or *Great South Sea.*
The Aleutian Islands are very imperfectly shown.

It is most important, when you refer to those maps, to see whether

they wrote the names large or small, in order to see the importance they attach to them.

Then you will find page 94, 1794, No. 15, an important map

Prepared by Lieut. Henry Roberts under the immediate inspection of Captain Cook, London. Published by William Faden, Geographer to the King.

Mr Justice Harlan. — Before you get to that, there is a similar reference, on page 93.

Sir Richard Webster. — Will you kindly give me the date?

Mr Justice Harlan. — It is number 4, on page 93 the year being 1784. There *Behring Sea* is named *Sea of Kamchatka*, and then there are other seas there. Then there is the *Northern part of the Pacific* or *Great South Sea*. Have you got that chart itself, so we can see how they are divided?

Sir Richard Webster. — I do not know whether we have but I may be able to obtain it for you.

Mr Justice Harlan. — I desired to ask in that connection how many more of those maps, by name and in words, speak of the Pacific as the *South Sea* or *Great South Sea*.

Sir Richard Webster. — I have not worked it out. I know the name *Great South Sea* disappeared very soon; but about what date I could not tell you. I will try and have it worked out, Judge, if I can.

Mr Justice Harlan. — I do not know that it is important. We can do that.

Sir Richard Webster. — Yes. If you will look at 1794, which is a very important map, you will see that it is one which undoubtedly made what I may call a record at the time. It is number 15. The advertisement was :

The interesting discoveries made by British and American ships since the first publication of the Chart in 1784, together with the hydrographical materials lately procured from St. Petersburgh and other places, have enabled Mr de la Rochette to lay down the numerous improvements which appear in the present edition.

Mr Justice Harlan. — That is the second edition of the map to which I have just called attention.

Sir Richard Webster. — You are quite right :

The main body of Behring Sea, which in the first edition was styled *Sea of Kamchatka*, here appears without any distinctive name.

Sea of Kamchatka is written on the waters immediately adjacent to the peninsula.

Sea of Anadyr replaces the *Gulf of Anadyr* of the 1st edition.

Sea of Okotsk appears as a name of equal right with *Sea of Kamchatka* and *Sea of Anadyr*.

Beaver Sea is written in smaller characters along the Kamchatkan coast to the north of Petropaulovski.

Behring Strait, Bristol Bay.

North Part of the Pacific Ocean or *Great South Sea.*

At that time it appears at that the name Great South Sea still continued to be used.

Then I have marked a good many; but I think I might perhaps indi-

cate the numbers without reading them, of those that are clearly important. There are numbers 17 and 18, two of the French maps, in which Behring Sea is not named, but the whole of the North Pacific is called *Grand Ocean Septentrional*, and *Grand Ocean*. Then there are 24 and 25.

Mr Justice Harlan. — It was named the Sea of Kamchatka in 1817.

Sir Richard Webster. — No, Sir; not in number 17.

Mr Justice Harlan. — On page 99. I thought you meant the year 1817.

Sir Richard Webster. — No; I was giving the number of the map. No. 17 on page 95, in the year 1798. They are numbered consecutively; and number 18 is in the same year. Then I should call attention to 24, 25, 26, and 32.

Mr Justice Harlan. — I see that in number 24 Behring Sea is known as *Beaver Sea* and the North Pacific is named *Southern Ocean* or *Still Sea*.

Sir Richard Webster. — I do not know whether you have noticed it; but *Beaver Sea* which is written across in some maps is in the more correct maps written as a small local name close to the coast of Kamchatka. It is mentioned in more than one place in these maps, and written in smaller characters along the Kamchatkan Coast to the north of Petropaulovski.

Then there is number 40, which is an important map, on page 96 :

Arrowsmith's Chart of the Pacific Ocean. This is a large and important Map in nine sheets, specially devoted to the Pacific Ocean. Originally published in 1798. This edition with corrections to 1810. The northern edge of the Map runs about latitude 62 degrees north, and it includes the greater part of Behring Sea but shows it as a large blank unnamed space. *Bristol Bay* alone is rather prominently named. By contrast, the *Sea of Okhotsk*: *Sea of Japan*, and other enclosed seas are named.

If you will kindly look, Mr President, at the map of the Pacific, it takes you up to 62 degrees. It would be a little south of the Yukon River, and therefore includes a great deal more than nine-tenths of Behring Sea as now understood. That is to say, it is some 500 miles north of the Pribilofs, and would practically be, for all substantial purposes, the whole of Behring Sea, except the part immediately running into the neck of Behring Straits; and that was a chart of the Pacific Ocean as early as the year 1810.

Mr Justice Harlan. — The map published by that same man according to Mr Blaine's list, in 1811, in London, gives the Sea of Kamchatka.

Sir Richard Webster. — I think, Sir, that is number 46 in our list.

Mr Justice Harlan. — Yes; that is the same one.

Sir Richard Webster. — (Quoting) :

Hydrographical Chart of the world: A. Arrowsmith, 1811.
Behring Sea named Sea of Kamchatka.
Behring's Straits. North Pacific Ocean.

We would have to look at that map to see how the words " Sea of

Kamchatka " were used; but I do not think it in any way strengthens the contention of my learned friends to suggest that what I may call varying names are sufficient to differentiate this from a part of the Pacific Ocean.

Lord Hannen. — What is that intended to indicate, Sir Richard, " *Bering's Strait, North Pacific Ocean* " ? They are written in italics. Does it merely mean that Behring Strait is put in, or does it indicate at all how far out the North Pacific Ocean extends?

Sir Richard Webster. — I do not think it indicates anything more than that Behring Strait is put in. The names that appear are *Sea of Kamchatka* and *Behring Strait*.

Mr Justice Harlan. — It does not show their relation to each other. Right along in those years the Sea of Kamchatka seemed to be all one name with Behring Sea.

Lord Hannen. — Have you got any one of the maps which would illustrate what is meant by this collocation of Behring Straits and North Pacific Ocean?

Sir Richard Webster. — I will find out, my Lord. I cannot answer it off-hand, because the work of examining them is so heavy that I cannot say for certain whether any of those are actually accessible.

Then, Mr President, a great deal of information is given on page 105 as to the meaning of the words " Northwest Coast "; and again there is not any evidence to be found of Northwest Coast being used in this limited sense in any of the existing books. It simply is a question of instance after instance of either Northwest Coast being specially defined for the purposes of the book, indicating a particular part, or Northwest Coast being used as including the whole. Where is there any evidence of Northwest Coast being recognized as being the piece between latitude 60° and latitude 54° 40'. I will now give you a reference to the pages. You will find that fully examined on pages 105 to 108 of that Appendix; but I can put that a little more briefly before the Tribunal, if they will kindly refer to page 66 of the British Case. This is a book published in 1840 by Mr Greenhow, whom you will find is admitted by the United States people, at that time, at any rate, to be a great authority. At page 66 is set out the extract from his work of the year 1840 :

> The *Northwest Coast* —
>
> And these italics are Greenhow's own.
>
> is the expression usually employed in the United States at the present time to distinguish the vast portion of the American continent which extends north of the 40th parallel of latitude from the Pacific to the great dividing ridge of the *Rocky Mountains* together with the contiguous islands in that ocean. The southern part of this territory, which is drained almost entirely by the River Columbia, is commonly called *Oregon*. —

I believe the Columbia River comes in — I see it marked there a little way down the red color, Mr President. —

From the supposition (no doubt erroneous) that such was the name applied to its principal stream by the aborignes. To the more northern parts of the continent many appellations which will hereafter be mentioned, have been assigned by navigators and fur traders of various nations. The territory bordering upon the Pacific southward, from the 40th parallel to the extremity of the Peninsula which stretches in that direction as far as the Tropic of Cancer, is called *California*, a name of uncertain derivation, formerly applied by the Spaniards to the whole western section of North America, as that of *Florida* was employed by them to designate the regions bordering upon the Atlantic. The Northwest Coast and the West coast of California, together form the *west coast of North America;* as it has been found impossible to separate the history of these two portions, so it will be necessary to include them both in this geographical view.

Mr Greenhow here gives the following note :

In the following pages the term "coast" will be used sometimes as signifying only the seashore, and sometimes as embracing the whole territory, extending therefrom to the sources of the river; care has been, however, taken to prevent misapprehensions, where the context does not sufficiently indicate the true sense. In order to avoid repetitions, the *northwest-coast* will be understood to be the *nort-west coast of North America;* all latitudes will be taken as north latitudes, and all longitudes as west from Greenwic.., unless otherwise expressed.

The Memoir continues as follows :

The northern extremity of the west coast of America is *Cape Prince of Wales*, in latitude of 65 degrees 52 minutes, which is also the westernmost spot in the whole continent; it is situated on the eastern side of Behring's Strait, a channel 51 miles in width, connecting the Pacific with the *Arctic* or *Icy* or *North Frozen Ocean*, on the western side of which strait, opposite *Cape Prince of Wales*, is *East Cape*, the eastern extremity of Asia. Beyond *Behring Strait* the shores of the two continents recede from each other. The north coast of America has been traced from *Cape Prince of Wales* northeastward to *Cape Barrow*.

The relations of Behring Sea to the Pacific Ocean are defined as follows in the "Memoir" :

The part of the Pacific north of the Aleutian Islands which bathes those shores is commonly distinguished as the *Sea of Kamchatka*, and sometimes as *Behring Sea*, in honour of the Russian navigator of that name who first explored it.

Then he refers to Cape Prince of Wales as follows :

Cape Prince of Wales, the westernmost point of America, is the eastern pillar of Behring Strait, a passage only 50 miles in width, separating that continent from Asia, and forming the only direct communication between the Pacific and Arctic Oceans.

The part of the Pacific called the *Sea of Kamchatka*, or Behring Sea, north of the Aleutian chain, likewise contains several islands."

In the year 1845 the Government of the United States sent Mr Greenhow's book "The History of Oregon and California and the other territories of the Northwest Coast of America" to the Government of Great Britain as being in some sense an official document, evidently desiring it to be regarded as containing very accurate information. We happen to have that original book here, the one which was sent at that time; and it is at the service of any one of my friends or any one of the

Tribunal. It would simply be a matter of reading page after page and extract after extract in which you will find both the "Pacific Ocean" and the "Northwest Coast" are used by Mr Greenhow in his works as referring to the part of America extending right away from about latitude 51° — perhaps a little lower than that ; 50° would be perhaps more correct — right away up into the Arctic Ocean.

It does seem to me a little difficult for those who desire so to contend that this indicates or supports the views that the Pacific Ocean was commonly known as including Behring Sea.

You will remember, Sir, that Lord Salisbury in his dispatch of the 21st February 1891 points out that it has been the constant practice all over the world to call seas, bays and other parts of the ocean by local names, and yet they may all be covered by the generic name which covers the whole of it. There is a clear and important passage contained on page 89 of part 2 of volume 3 ; but I will not trespass upon your time by reading it at length. But Sir, it does appear to me a little strange that the United States should raise this contention.

The Tribunal here adjourned for a short time.

Sir Richard Webster. — Mr President, a question was put to me by Mr Justice Harlan upon the maps, to which, perhaps, I ought to refer only for one moment, just to show the impossibility of relying upon matters of this kind without full examination. In page 265 of the first volume of the United States Appendix will be found an extract from Mr Blaine's letter with reference to the maps, and I refer to one of them :

> English statesmen of the period when the treaties were negotiated had no complete knowledge of all the geographical points involved. They knew that on the map published in 1784 to illustrate the voyages of the most eminent English navigator of the eighteenth century the Sea of Kamchatka appeared in absolute contradistinction to the Great South Sea or the Pacific Ocean. And the map, as shown by the words on its margin was prepared by Lieut. Henry Roberts under the immediate inspection of Captain Cook.

If you will refer to the list of maps to which I was calling attention before, namely, page 94 of the first volume of the Appendix to the Counter Case you will see that map referred to. It is page 93, number 4 :

> Chart of the North West coast of America and the North East Coast of Asia explored in the years 1778 and 1779. Prepared by lieutenant Roberts under the immediate inspection of Captain Cook, published by W. Faden, Charing Cross, July 24th, 1784.

That is the map, Mr Blaine refers to. Now, if you will be good enough to turn over to page 94 you will find Mr Blaine has overlooked the fact that 10 years later the 2nd edition of that map was published also prepared by Mr Roberts [No 15] and also published by Faden in which distinctive use of the name has disappeared altogether. May I ask you to look at page 93, No 4 where you find the words "Behring Sea named

Sea of Kamchatka" and if you look 10 years later the next edition of that map 1794 to which no reference is made by Mr Blaine.

The main body of Behring Sea, which in the first edition was styled Sea of Kamchatka, here appears without any distinctive name, Sea of Kamchatka is written on the waters immediately adjacent to the peninsula.

So that you will observe that the whole point of Mr Blaine's argument disappears if you look at the second edition of that map published in 1794. He is referring to the edition of 1784.

This was called to my attention during the adjournment, and I mention this for the purpose of enforcing the fact. Unless you have the maps before you and see how the words are used, no inference can be drawn from them; whereas, in the statement in the "Gazetteer", you have the specific statement made on the authority of the Geographer, whoever it is, telling you exactly what is meant, though, of course, it depends on your knowledge of the man as to the amount of authority to be attached to the statement.

Now, when the Tribunal adjourned, I was about to call attention to other uses of the Northwest Coast which are consistent only with our view and inconsistent with that of the United States; and I desire, if I possibly can, to put it as shortly as possible, and I will a little vary the order of my observations.

I will ask the Tribunal to take before them pages 40 and 41 of the 1st Volume of the Appendix to the British Case, which will enable me to give them several references without turning from one volume to another.

I am now upon the period subsequent to the Treaties of 1824 and 1825. I am reading from the historical review of the formation of the Russian American Company by Tikhmenieff, published in St Petersburgh in 1863. You will observe that the year 1842 is referred to; and you will observe there that reference is made to reports by Governor Etolin of the continuous appearance of American whalers in the neighbourhood of the Harbours and Coasts of the Colony; and you will find that a statement is made that in the year 1841 there had been whalers to the number of 50, and that large quantities of whales had been secured; and you will find that the Foreign Office, in reply to energetic representations made by the Company, had replied :

The claim to a *mare clausum*, if we wished to advance such a claim in respect to the northern part of the Pacific Ocean, could not be theoretically justified. Under Article I of the Convention of 1824 between Russia and the United States, which is still in force American citizens have a right to fish in all parts of the Pacific Ocean. But under Article IV of the same Convention, the ten years' period mentioned in that Article having expired, we have power to forbid American vessels to visit inland seas, gulfs, harbours, and bays for the purposes of fishing and trading with the natives. That is the limit of our rights, and we have no power to prevent American ships from taking whales in the open sea.

Then :

From 1843 to 1850 there were constant complaints by the Company of the increa-

sing boldness of the whalers. They were not content with landing on the Aleutian and Kurile Islands, cutting wood wherever they chose, boiling blubber on the shore," *then* 10 *lines lower down* " Traffic in furs was openly carried on between the natives and the American Captains, and when the Colonial authorities made some whalers leave Novo Arkhangelsk (N P) on that account, they quietly continued the traffic in the Bay of Sitka, and disregarded all protests. The following case also deserves to be noticed; in 1847 one of the whalers came to Behring Island, and on the Captain being told that he must not traffic in seal-skins on a neighbouring small island, he ordered the overseer of the island to be turned off his ship, and immediately went on shore with his men, with the evident intention of disregarding the prohibition.

It was only when active steps were taken to resist them that the whalers left, but before going they cut down a plantation which had been grown with great trouble, the island being without other trees or shrubs. Few of the districts of the colony escaped the visits of the whalers, which were everywhere accompanied by acts of violence on their part.

Whenever complaints of such acts reached the Company, they took all the steps in their power to protect the country under their administration; but all their efforts led to no satisfactory result. In 1843, almost immediately after the first protest of the Company, the colonial authorities were alarmed at the large number of whalers engaged round the shores of Kadiak, as the Company's fur trade was certain to suffer from their presence.

And there was a request for a cruiser made to prevent the vessels from interfering and going into the territorial waters of Russia.

Then lower down, there is this.

In 1847 a representation from Governor Tebenkoff in regard to new aggressions on the part of the whalers gave rise to further correspondence. Some time before, in June 1846, the Governor-General of Eastern Siberia had expressed his opinion that, in order to limit the whaling operations of foreigners, it would be fair to forbid them to come within 40 Italian miles of our shores, the ports of Petropaulovsk and Okhotsk to be excluded, and a payment of 100 silver roubles to be demanded at those ports from every vessel for the right of whaling. He recommended that a ship of war should be employed as a cruiser to watch foreign vessels. The Foreign Office expressly stated as follows in reply. We have no right to exclude foreign ships from that part of the Great Ocean which seperates the eastern shore of Siberia from the north-western shore of America or to make the payment of a sum of money a condition to allowing them to take whales.

I need not remind you, Mr President, as my learned friend, the Attorney General, pointed out, that could only be and is only the Behring Sea, no other part of the Great Ocean corresponds with that.

Then, at the bottom of the page, going on to the year 1853, you will actually find the instructions to cruisers :

The cruisers were to see that no whalers entered the bays or gulfs, or came within 3 Italian miles of our shores, that is, the shores of Russian America (north of 54°41'), the Peninsula of Kamchatka, Siberia, the Kadiak Archipelago, the Aleutian Islands, the Pribilof and Commander Islands, and the others in Behring Sea, the Kuriles, Sakhalin, the Shantar Islands, and the others in the Sea of Okhotsk to the north of 46°30' north. The cruisers were instructed constantly to keep in view that " our Government not only does not wish to prohibit or put obstacles in the way of whaling by foreigners in the northern part of the Pacific Ocean; but allows foreigners to take whales in the Sea of Okhotsk, which, as stated in these instructions, *is, from its geographical position, a Russian inland sea* ".

Now in the face of that brief summary which I have been fortunately able to take from one document, referring to 1842, 1843, 1847 and 1853, it is obvious, and cannot I submit be denied by the Counsel for the United States, that there were at this time no acts supporting the contention that Russia never withdrew her prohibition with regard to navigation and fishing in Behring Sea, that Great Britain had recognized that the prohibition extended to Behring Sea. I will read if you please, Mr President, from pages 56 and 57 of the United States Case which still stands.

> But neither in the protests negociations, nor treaties is any reference found to Behring Sea, and it must be conceded from a study of those instruments and the subsequent events that the question of jurisdictional rights over its waters was left where it had stood before the treaties, except that the exercise of these rights by Russia had now, through these treaties, received the implied recognition of two great nations; for while, by the Ukase of 1821 Russia had publicly claimed certain unusual jurisdiction both over Behring Sea and over a portion of the Pacific Ocean, yet in the resulting treaties which constituted a complete settlement of all differences growing out of this Ukase, no reference is made to this jurisdiction so far as it related to Behring Sea although it is expressly and conspicuously renounced as to the Pacific Ocean.

Will you for a moment consider what that case means? I must assume that I have demonstrated to this Tribunal that the suggestion that there was no reference made to Behring Sea in the negotiations or the treaties is unfounded, but the fact that they have distinctly stated in their case that in regard to what they are pleased to call the Pacific Ocean there was an express withdrawal by Russia of her attempt to limit the rights of navigation and fishing, points and certainly accentuates the observations I have ventured to make as to what was going on, after 1824 and 1825, in this part of the sea referred to by them as being part of the Great Ocean which separates the Eastern Coast of Siberia from the north western part of America, from which they had no right to exclude navigation or fishing vessels of the United States and Great Britain.

If the Tribunal will be good enough to look at page 51 of the British Counter Case you will find certain contemporaneous uses of the word north-west, in the face of which I submit, it is impossible for my learned friends effectively to maintain their contention.

Let me remind the Tribunal of what their contention is.

That although the coast of which we are speaking is in fact the Northwest Coast, yet the term Northwest Coast had such a technical meaning that it is to be confined to the space between latitude 60° and latitude 54°40', or south of it — nothing north of latitude 60°.

At page 51 the Tribunal will see that by Treaty of 20th December 1841 (the reference to Hertslet is given and we have Hertslet here) — Great Britain, Austria, France, Prussia and Russia entered into a Treaty for the suppression of the Slave trade and in no case was the mutual right of search to be exercised upon the ships of war of the High Contracting Parties. It is sufficient for my purpose that one of the contracting parties was Russia. By section 8 of the annex to that treaty this exemption

was extended to vessels of the Russian American Company, such vessels to have a patent and prove their place of origin and of destination.

Perhaps it would not be out of place if I reminded you here of a most extraordinary contention that appears in the argument of the United States for the first time — that the Russian American Company had no monopoly after 1824 and 1825 of the eastern shore of America. It is one of the instances in which the United States have thought it necessary to suggest that an important official document is wrongly worded, and have without justification, as we shall submit, altered the wording to support their meaning. But at present, to make my point clear, I call attention to the fact that the Russian American Company had at this time, as I shall show you, the monopoly from Behring Straits on one side down to latitude 54° 40′ on the other, and from Behring Straits on one side down to the Island of Urup on the Asiatic Coast — their vessels were to be exempted from search and each vessel was to have a patent; a form of this patent is set out at page 51 of the British Counter-Case:

> Upon this ground the Administration of the Russian American Company, being about to dispatch their ship *blank* named *blank* built in the year *blank* of *blank* tonnage and commanded by *blank* to the north-western coast of America to the colonies settled there, with the right to enter all ports and harbours, which necessity may require, considers it conformable to the above cited Article of the Instruction that besides the patent authorizing the hoisting of the Russian flag by merchant ships in general, the said vessel of the Company should be provided with this special patent to secure her against the visit of the cruizers of the contracting parties.

Mr President, is it reasonable to suggest that in the patent given to these vessels, Northwest Coast there meant between 60° and 54° 40′? Is it not perfectly obvious that they were referring there to the whole length of the Northwest Coast of America from 54° 40′, as far as the Russian dominions extended, and I call your attention, and you will see the reference upon the same page, to this, that in the year 1843, that Treaty having been made in the year 1841, the Treaty of 1825 was renewed in these words:

> It is understood that in regard to commerce and navigation in the Russian possessions on the Northwest Coast of America, the convention concluded at St. Petersburgh on the 16th February, 1825, continues in force.

Would anybody suggest that only means the portion of the Northwest Coast to which my learned friend, Mr Carter, asks you to attribute the limited meaning to which I have referred.

Senator Morgan. — My suggestion, Sir Richard, was in reference to the question whether it included the hunting of animals that were furbearing.

Sir Richard Webster. — I quite follow you, Sir. As I have said more than once, I never relied upon these Treaties as a grant at all. I have always relied upon them as an undertaking by Russia not to interfere, but it does not touch the point you referred to when you suggested

what must be found in the Treaties. Then the Treaty of the 12th of January 1859, between Great Britain and Russia, Article XIX, says.

In regard to commerce and navigation in the Russian possessions on the North West Coast of America, the Convention concluded at St-Petersburgh on the 16th (28th) February, 1825, shall continue in force.

Mr President, you are infinitely better acquainted with diplomatic matters, even after the study that I have had with regard to this case, than I could ever hope to be; but it does seem a strong thing to suggest that North West Coast, in these renewed Treaties, did not refer to the whole North West Coast from 54° 40', the power of settlement becoming more and more probable, yet according to my learned friends' contention the North West Coast is used in a different sense in these Treaties, and the phrase "North West Coast", as invented by Mr Blaine finds no place in the history of these matters.

If one could use the expression with reference to this matter as making a thing plainer which in my submission is perfectly plain. I would ask you to turn to pages 63 and 64 of the Counter Case where there appears again that which we submit, is utterly inconsistent with the narrow use of "north-west coast" contended for. In 1799 the Russian American Company got on the American side from Behring Straits to latitude 55°; it is sufficient for my purpose to deal with the American side; the Asiatic side did not vary. In 1799 the Russian Company got in terms the monopoly from Behring Straits down to latitude 55°. In 1821, just seven days after the Ukase, they got from Behring Straits down to latitude 51; that is to say Russia attempted to push the southern boundary lower than 55°. In 1829, after the Treaty — and now I will ask you to refer to page 61 — you will find the reference to the 1821 charter at the bottom of that page :

"The privilege of hunting and fishing *to the exclusion of all other Russian or foreign subjects* throughout the territories long since in the possession of Russia on the coasts of North-west America, beginning at the northern point of the island of Vancouver, in latitude 51° north, and extending to Behring Strait and beyond...

I notice in passing, so that I need not call attention to it again, that this is the only charter in which the words "foreign subjects" appear. It was in consequence of the attempt by Russia to extend her rights under the Ukase of 1821. If you will now turn over to page 62, you will find how the area of the monopoly of the Russian Company was described in the year 1829 after the Treaty. 51° was no longer possible, because they had agreed with the United States that the southern limit of their operations should be 54° 40'.

The limits of navigation and industry of the Company are determined by the Treaties concluded with the United States of America, April 5 (17), 1824, and with England, February 16 (28), 1825.

(3) In all the places allotted to Russia by these treaties there shall be reserved to the Company the right to profit by all the fur and fish industries *to the exclusion of all other Russian subjects*.

Could anybody produce the slightest authority for the suggestion that the Company lost their monopoly on the east side of Behring Sea? There is not a vestige of evidence, and I speak challenging correction by my learned friend Mr Phelps, and asking him to refer to any document showing that it was not intended to convey the monopoly to the Russian Company from Behring Straits to 54° 40'. In 1799, it was down to 55°; and, in 1821, it was down to 51° in terms; and, in 1829, it is the whole area assigned to Russia. It must have been, and was, the whole North-West Coast of America above 54° 40', which was the part exclusively assigned to Russia, as compared to that below, which was exclusively assigned to the United States. Observe that 54° 40' was to be the dividing line, and yet it is necessary, for the purpose of my learned friends' argument, for them to contend for the first time that of which there is not a trace during 100 years of the history of this matter, that the Russian Company had not the monopoly on the eastern shore of Behring Sea.

Now, look at page 63 of the Counter Case, where you will observe the renewal suggested in the year 1865 : —

> The Minister proposed, in paragraph 15, to reserve to the Company the exclusive right of engaging in the fur-trade as defined within the following limits : —
>
> On the peninsula of Alaska, reckoning as its northern limit a line drawn from Cape Douglass, in Kenia Bay, to the head of Lake Imiamna; on all the islands lying along the coast of that peninsula; on the Aleutian, Commander, and Kurile Islands and those lying in Behring's Sea, and also along the whole western coast of Behring's Sea.

I had better show you where that is. The line goes across the Alaskan peninsula; and what they intended to give to the Russian Company was the Peninsula and the Aleutian Islands in Behring Sea; the west coast and what they proposed to take away from them was, down to 54° 40' and the eastern side of the Behring Sea. And the United States suggest the Russian people did not know what they were talking about, and that " eastern " meant " western "; the words are.

> in the district to the north-east of the peninsula of Alaska along the whole coast to the boundary of the British possessions. —

that, of course, means from about Kadiak Island, where the line comes out, to 54° 40', —

> also on the islands lying along this coast, including in that number Sitka and the whole Koloshian archipelago, *and also on land, to the northern extremity of the American Continent*, the privilege granted to the Company of the exclusive prosecution of the said industry and traffic.

Or, in other words, they were to have nothing on the North-West Coast of America south and east of Kadiak Island or north of the boundary of the Alaskan Peninsula there described as Cape Douglas, which is in Kenia Bay, which is just about the northern end of Kadiak Island and the other Bay is over towards Bristol Bay.

Therefore, it proceeded to withdraw from the monopoly the eastern side of Behring Sea, and to retain to them the western.

Now this is a conclusive argument against the United States' contention, and how do they deal with it. I am afraid I must trouble you to look page 77, volume I, United States Appendix, Paragraph 15. This is the proposal for renewal in the year 1865. They proposed to reserve.

To the Russian American Company until January, 1st 1882, the exclusive right of engaging in the fur trade within the following limits only : On the peninsula of Alaska, taking for its northern boundary the line from cape Douglas, in the Bay of Kenai, to the upper shore of Iliamna Lake; upon all the islands situated along the coast of that peninsula, namely, the Aleutian Islands, the Commander Islands, the Kurile Islands, as well as upon the islands situated in Behring Sea, and along the whole Western shore of Behring Sea.

And then, with a boldness to which in other Courts I might give a stronger name — but I will not before this Tribunal use any other word than boldness, — they put a foot note,

it is clear from the context that it is intended to refer to the eastern shore of Behring Sea.

There is not the slightest warrant for it, if you will read on what they were going to withdraw.

As regards the region stretching Northeast of the Alaska peninsula, along the whole of the coast up to the boundary line contiguous with the possessions of Great Britain, and on the islands situated along that coast, including Sitka and the whole of the Koloshian archipelago, and likewise, on the continent of the Northern part of America

That was the eastern part of Behring Sea — as to which the privilege is to be abolished. Therefore, Mr President, the stress of the argument leads the United States to this position, that they are obliged to rely upon a contention for which there is no affirmative support in the whole of the original documents, from the year 1820 up till the year 1865, and they are obliged to alter and change a word in an original Russian document, so as to make it meaningless, or otherwise their contention about the North West Coast falls to the ground. I submit that when a contention requires such arguments as that it is not one that will receive judicial support.

Now I will assume, for the purpose of my argument that I have satisfied you that Behring Sea was included in the words " Pacific Ocean " in the Treaties of 1824 and 2825, and that the only assertion of right which was made by Russia was the right contained in the Ukase of 1821 to prohibit the access of ships within 100 miles of her coasts on both eastern and western shores of Behring Sea as well as further down upon the coast.

Let me for a few moments remind you of the questions I have been examining before I pass on. The first Question as you know by heart is this :

What exclusive jurisdiction in the sea now known as the Behring Sea and what exclusive right in the seal fisheries therein did Russia assert —

It is not too much to say that Russia asserted nothing except that which is contained in the Ukase of 1821. That is the only assertion to which my learned friends are able to point —

— " and what exclusive rights in the seal fisheries therein did Russia assert and exercise? "

up to 1867? Mr President, this is a Court in which, although the rules of evidence are fortunately in one sense lax — though matters of history, matters of repute and matters of report have been examined — although the widest range has been permitted to the United States to bring before this Tribunal anything which they can prove or produce in support of their allegation or assertion of an exercise by Russia, from beginning to end of the papers as they stand to-day — the Case, Counter Case, and oral or written argument — there is not a single act of exercise proved or even suggested by Russia. We stand in this position, that the Ukase of 1821, as was proved by my learned friend the Attorney General — and I will not go over that ground again — was never exercised or acted upon. The Ukase was withdrawn.

Senator Morgan. — Before you leave that Sir Richard, how could Russia withdraw something she had never asserted?

Sir Richard Webster. — The point would be this. I should be entitled to claim a wider finding on the part of Great Britain than I was prepared to admit, I was going to say, from the point of view of mere assertion.

Senator Morgan. — I was speaking of the use and enjoyment for a great many years of the products of fur-bearing animals.

Sir Richard Webster. — All I can say is this; speaking of this as exclusive jurisdiction, and assertion and exercise, there is not upon the high seas, or outside territorial waters, the suggestion of any exclusive enjoyment.

Senator Morgan. — Then she had nothing to surrender.

Sir Richard Webster. — I am sure it was my fault, but I was not speaking of surrendering; I never used the word " surrender ". I say the Treaty of 1824 and 1825 was a bargain by Russia she would not impede or interfere with the rights of the United States and Great Britain on the high seas. There is no question of surrender — there was nothing to surrender. Russia attempted to interfere. That interference had been protested against; that interference had been abandoned; and then there is the promise that Russia will not interfere again. But that is not a surrender; that is a statement made in the most solemn manner, — an acknowledgment that the attempted interference could not be insisted upon. But that is no surrender.

Take the case of my own country years ago, when she used to order that vessels should lower top-sails within a certain distance wherever they met a British ship or within some arbitrary limits. Ultimately nation says: " I am not any longer going to do it. " To a nation that has never been put under that restriction, it is no surrender to say: " We

will no longer *insist* on your doing it — it is an acknowledgment that we are not trying to enforce a right against you". With great deference, the whole distinction is this : That the first Article of that Treaty did not grant or give to the United States, or to Great Britain, anything — they only acknowledged that Russia — I will not use the expression, had been *wrong* if it be thought that that be too much to say of a great Nation — that Russia no longer insisted upon a claim which, in a moment of inadvertence at the dictation of the Russian American Company she had thought fit to make. I do not call that a *surrender* — she had no rights which she was surrendering — she was simply saying: "I will not put a gate up; I will not hinder you from pursuing your lawful right." I have (to put an illustration) the right to go along a certain road. A man puts a gate across it and stops me. I say to that man: "Take that gate down." He says: "Yes, I will take it down; I will not put it up again." That is no surrender. Therefore I submit you have not to consider the question of anything more, for this purpose, than the assertion and exercise of exclusive rights in Behring Sea and in the Seal fisheries in Behring Sea — (not on the *islands*; nobody suggest we are talking about the islands in Behring Sea) — by Russia prior to the cession to America in 1867.

Senator Morgan. — If you will allow me to call attention to it, you identify this fishery with the right of navigation and whale fisheries, or other fisheries if you please; and it is a matter open to argument to say the least of it, whether Russia in her Treaties of 1824 and 1825 intended to abandon what she had so long exercised, — the right of controlling the taking of fur bearing animals within Behring Sea.

Sir Richard Webster. — With great deference, Russia had never controlled, or exercised any control over seal fisheries on the high seas of Behring Sea at all.

Senator Morgan. — That is assumed by the other side.

Sir Richard Webster. — Forgive me putting it to you — where is the evidence of it? Russia had never lifted hand nor foot with reference to the seal fisheries on the high seas, and I absolutely deny for this purpose, there is any difference between whales and seals. There is no greater crime committed by a person who shoots a seal on the high seas, than by a person who harpoons, or spears a whale. Do not ask me to argue the question of property at the present moment — I am not upon it; but with reference to the observation — I submit to you we are dealing with rights alleged in the seal fisheries properly so called in the high seas of Behring Sea, — Russia as to these had done nothing; and therefore arguing on the premiss with which you were good enough to start, couched in some general terms, that Russia had done everything to control the seal fisheries in Behring Sea, I submit — she had done nothing.

Senator Morgan. — I am not making the assertion on my own part, I a am only asserting what I suppose to be insisted on by the other side.

Sir Richard Webster. — My word is no better and no worse than that of my friends Mr Phelps and Mr Carter — and I say their saying " Russia asserted and exercised rights, " does not prove it. Through the whole length and breadth of the books which I have read more than once — there is not a trace of Russia controlling or exercise any rights in seal fishing outside territorial waters in Behring Sea — not a vestige. Whenever Russia asserted rights — such as the notice to her cruisers to prevent people from landing — to prevent people going in territorial waters — to prevent persons from occupying places upon the land and becoming members of guilds and things of that kind — this notice had nothing in the world to do with the exercise of rights upon the high seas.

The President. — I think there are parts of documents which I have already alluded to whilst Mr Carter or Sir Charles Russell was arguing — which implied, I will not say the assertion as Mr Carter disclaimed the word, but the affirmation of the right by Russia of controlling the whole of Behring Sea — the theoretical affirmation at any rate of Russia considering herself as being in a manner *authorized* to control the whole of the Behring Sea.

Sir Richard Webster. — Mr President, I did not for a moment imagine you would think I was overlooking that. If it had been necessary for me to argue that Russia claimed to close the whole of this sea, there is distinct proof that she did so claim. Mr de Poletica said in his letter — I quote from memory but I do not think I am quoting inaccurately — I would have you know that this sea has all the incidents of shut seas — mers fermées. But my friends disclaim it. It is in my favor, Sir, to make that contention. Upon the mere question of assertion I care not how wide the claims of Russia were — my point was entirely upon *exercise*.

The President. — I Suppose under the Treaty it is our duty to deal the question of assertion as well as the exercise of it?

Sir Richard Webster. — I did not venture to dictate to you as to what construction you would put upon Russia's assertion. If you will remember, I spoke of it as an assertion of right by the Ukase of 1831. If that was an assertion of right, or if all the documents with which it was accompanied shew that it was an assertion of right to treat Behring Sea as a closed sea, I agree, it is your duty so to find. But my friends will not have that. My friends in the exercise of their judgment have thought fit to say : " Russia never did assert that right : Russia only asserted the right to exclude vessels 100 miles from its coasts as a defensive regulation; and they are pleased, in the exercise of their wisdom to say that was not ————

The President. — Sir Richard I am asking you for help if you please and if you can give it to me I am sure you will help us.

Sir Richard Webster. — Certainly.

The President. — Suppose neither of the parties said that Russia

asserted such a right, and that in our personal conviction Russia did assert such a right, what do you think the finding ought to be ?

Sir Richard Webster. — I think the finding ought to be in accordance with your conviction, Sir. But Sir, do not misunderstand me. I have not suggested that Russia did not assert a right — I simply said that the only assertion by Russia was contained in the Ukase of 1821, and that on the most narrow construction put upon that Ukase by my friends, it was an exercise by Russia of exclusive jurisdiction to the extent of 100 miles from its shores. If you are of opinion (and I cannot say you are not justified), that the real assertion of Russia was a right to close Behring Sea and more than the sea, and that the restriction to the 100 miles was in her discretion by the making of the law which she thought fit — I hope I make my meaning clear to you, Sir.

The President. — Perfectly clear.

Sir Richard Webster. — I should have thought — but that is not for me — that it was your duty to express on the Award, what the assertion of Russia was. Of course the word " assertion " may be used in two senses. It may be used in the sense of asserting that which one intends to act upon, or it may be used as a theoretical assertion not intended to be acted upon.

The President. — More as an affirmation than an assertion.

Sir Richard Webster. — Exactly.

Senator Morgan. — Will you allow me to say that an assertion might be defined by acts of exclusive enjoyment and ownership without any declaration at all.

Sir Richard Webster. — I am not at all certain from the point of view of assertion, if exclusion mean the exclusion, the shutting out other people it would not be the best form of assertion you could possibly conceive.

Lord Hannen. — It would be exercise also.

Sir Richard Webster. — It would then be exercise and assertion also.

Senator Morgan. — Is not exercise the strongest form of assertion? The law of prescription in your country and in mine — in England and in the United States — is based on occupancy, on a property right or privilege existing for 20 years.

Sir Richard Webster. — That really is involved in what I said, and Lord Hannen has, practically speaking, pointed it by the observation he was good enough to make.

In their Counter Case they say this. I am reading from page 19.

> The distinction between the right of exclusive territorial jurisdiction over Behring Sea, on the one hand, and the right of a nation on the other hand, to preserve for the use of its citizens its interests on land by the adoption of all necessary even though they be somewhat unusual measures, whether on land or at sea, is so broad as to require no further exposition.

It is a very convenient thing to say that a thing is so broad that it requires no further exposition. I remember in one part of the case they

say that something is much easier felt than expressed. But if you have not got a thing it is very much easier to feel it than to express it — I shall have to call attention to that on the question of property : but here they say the most simple minds can feel it, and therefore it is so broad as to require no further exposition. Then the passage proceeds :

> It is the latter right, not the former, that the United States contend to have been exercised, first by Russia, and later by themselves.

Now, Mr President, in order that you may understand the fullness of my meaning, I would adopt any form of words with regard to "assertion" which would commend itself to this Tribunal upon consideration. I care not for my purpose whether the assertion amounted to an assertion of right to close Behring Sea — I care not for my purpose whether it meant only an assertion to exclude vessels within 100 miles from the shore — it is equally immaterial, because whatever it was, was contained in a written document, namely, the Ukase of 1821. The action under that Ukase was never persisted in, on the contrary : — I do not think you want me to go again through the Duke of Wellington's letters and those other letters which show that it was not acted upon.

The President. — No it is not necessary.

Sir Richard Webster. — I am sure they are quite present to your mind and I submit that the so-called surrender was not a *surrender* of anything — it was an acknowledgment of the withdrawal of an assertion which Russia had thought fit to make according to the influences then controlling her, and no doubt as the Attorney General pointed out influences largely controlled and dictated by the Company.

The President. — Whether it is a surrender or a withdrawal makes no practical difference.

Mr Justice Harlan. — What you mean to say is that whatever, in the Ukase of 1821, was inconsistent with the Treaty of 1825, was annulled.

Sir Richard Webster. — Now the second question is : How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? That is the next contention.

Senator Morgan. — Before you get to that I would like to suggest this to you : That the common law of England (which is adopted also and practised in the United States ; at least, adopted as a measure of right in the United States in regard to a great many privileges and powers and rights of property) contains a doctrine of title by prescription — 20 years title by prescription.

Sir Richard Webster. — I have heard of it, Sir.

Senator Morgan. — Under which the Courts will presume the existence of a statute, will, grant, or deed, or anything, in order to secure the repose of society, and a quieting of litigation. Now with that as the origin or basis of the application of the doctrine of prescription, nothing is needed at all, except to point to undisputed possession for 20 years.

Sir Richard Webster. — *Exercised.*

Senator Morgan. — Exercised, that is all that is needed. I understand an assertion by Russia of a right to property for instance, or a right of jurisdiction in Behring Sea might, as against the United States and Great Britain, to say the least of it, possibly be maintained — I do not say that it could; but it may be said as a ground of argument that it might be maintained on the ground that they had exercised these rights in respect of fur-bearing animals in Behring Sea — the right to control them, to take possession of them, make grants of monopolies or charters, upon the basis of the existence of such property there, and that that would amount perhaps to such an assertion as is mentioned in the first point in this 6th Article of this Treaty.

Sir Richard Webster. — If I may respectfully attempt to answer you — I submit you do not help or elucidate the consideration by covering it up with generalities. Prescription is an undoubted principle both of the law of Great Britain, and, I believe, of the United States. Whether it has any application as between nations is a very much more doubtful point; but assuming it for this purpose — I think it an extremely doubtful point whether prescription has any application in such a case; but my answer, however, is a broader one — that in order to prove prescription, you must prove the existence of the right in respect of which the prescription is claimed and the exclusion of other people from that right.

Senator Morgan. — There is no question of that.

Sir Richard Webster. — And, in order to make one step in the direction of prescription, Russia (for I am speaking of Russia and the United States her successors) must prove this : that they alone enjoyed the right of catching seals on the high seas, and that they excluded other people from the right of catching seals on the high seas. I assert that you do not move one step towards arriving at the existence of a prescriptive right on the sea by proving you have killed seals on the land.

Senator Morgan. — Possibly you might, by proving that you claimed the right to catch them in a certain area and that nobody else has interfered with you.

Sir Richard Webster. — What area?

Senator Morgan. — Behring Sea.

Sir Richard Webster. — Now, we get much nearer the point, you will not find in the United States' written Argument, a claim to exclusive jurisdiction all over Behring Sea. I could have understood this case in law, if the United States had had the courage of the convictions of some of her original advisers, and had claimed it as *mare clausum*. — I could have understood the contention which you have been good enough to put before me. But, Sir, with deference, I submit to your judgment that the moment you get to what my friend, Mr Phelps, calls defensive regulations, — I am a little bit anticipating, but I cannot help it because you have been good enough to put the question to me, — the moment you get to what are called defensive regulations, or, in other

words, the right to defend interests upon land — the right to defend these interests in territorial waters, you abandon and cut away the idea that you have a prescriptive right then to claim the area outside. The whole strength and virtue of Mr Phelps' argument, to which I shall address myself to-morrow, in reference to defensive regulations, is that they have got no rights upon the high sea itself; but, as he has said, even assuming they have no right in the seal, no right in the seal herd, only a right to carry on the trade on land, he contends, in accordance with principles that we think erroneous, that he has a right to defend that interest by certain acts on the high seas which he endeavours to justify.

But in answer to your question I do not hesitate to put before you and I do not hesitate to submit to your judgment that an assertion and exercise of rights upon land, an assertion and exercise of rights in territorial waters, cannot detract one iota from the rights of other people upon the high seas.

Senator Morgan. — I admit that.

Sir Richard Webster. — You can test it in a moment. Supposing the Indian fishermen or the native Americans had been catching these seals at sea, and it was desired to stop them. The United States could not stop them on the ground of prescription. There is no greater prescription against the pelagic sealer than there was against the Indian. Stop them by legislation, possibly; stop them because they are United States citizens, possibly; stop them upon the ground that you have a right to interfere with their action within certain distances from the shore, possibly: these would be the exercise of sovereign dominion. But upon the point of view of prescription — I do not hesitate to say that a claim based upon prescription or upon an assertion that exercise on land gives foundation to a claim upon the high seas, not only will not bear investigation or examination, but it is fair to my learned friends to say that you do not find any trace of that contention in their arguments, written or oral. I confess I think it would have required very considerable boldness for any lawyer to stand up and contend that a right exercised upon the Pribilof Islands or in the territorial waters of the Pribilof Islands could by prescription give a right to the seal off Vancouver, or off Cape Flattery, or four thousand miles off in the Pacific Ocean. I shall endeavour to meet, of course, the arguments upon which that claim of property is attempted to be justified when I deal with question five.

My answer, Mr Senator Morgan, has been a little longer than I desired it to be, but I wished, out of respect for you, to indicate an argument which should answer the suggestion you made.

I come back to the point upon which your question was founded, the second question, or rather to the point at which I was speaking when you interposed your question.

How far were these claims as to the jurisdiction of the seal fisheries recognized and conceded by Great Britain? A man cannot recognize and concede that which another person does not do. You cannot recognize

and concede a right of which you have no knowledge. This recognition and concession must mean recognition and concession of a right to exclude a British ship, recognition and concession of a right to stop pelagic sealing, recognition and concession of a right of property in the seals claimed by the United States. Sir, there is not from beginning to the end of this long chapter even a suggestion by my learned friends of a recognition of any right in that sense. Recognition that the islands belonged to Russia, yes. Recognition that the territorial waters belonged to Russia, yes. Recognition that those same rights of territory and waters belonged to the United States, unquestionably. But that we have recognized what was intended to be claimed here under the first question — what I submit to this Tribunal is that there is no evidence of either recognition or concession by Great Britain in any legal or — I was going to say — any moral sense of the word; because no act of interference with the rights of Great Britain upon the high seas from the beginning to the end of this chapter has been indicated.

The President. — You mean to say that Russia did not attempt to interfere before the Treaty of 1825?

Sir Richard Webster. — Or after, Sir.

The President. — The period after that time was regulated by the Treaty.

Sir Richard Webster. — That is my point, Sir. I pointed out that the Treaties gave Russia no exclusive jurisdiction on the high seas in Behring Sea; and therefore I point out that there can be no recognition or concession by Great Britain of any exclusive jurisdiction by Russia on the high seas, either in respect to the seal fishery or anything else; because from the beginning to the end of the chapter there is no assertion by Russia followed up by exercise of anything which Great Britain has conceded at all.

The President. — I admit that is true since 1825, since the Treaty; but before the Treaty, would it be equally true?

Sir Richard Webster. — Equally true. They do not suggest any act of interference before 1821, excluding the paper Ukase.

The President. — Do you not believe that the Ukase of 1821 was the original cause of the Treaty of 1825?

Sir Richard Webster. — I think it was absolutely the cause. The treaties were a disclaimer by Russia of the Ukase — a disclaimer at the instance of Great Britain.

Lord Hannen. — What you say is that though Russia may have asserted some rights she never exercised them?

Sir Richard Webster. — And Great Britain never recognized them. I have passed for the moment, Lord Hannen, from exercise to recognition and concession.

Lord Hannen. — I know you have.

Sir Richard Webster. — And I was pointing out that the paper Ukase was protested against by Great Britain and was withdrawn at the instance of Great Britain.

The President. — But this paper Ukase which was in force from 1821 to 1825 was an attempt at exercise.

Sir Richard Webster. — It depends upon what you call in force. Writing a piece of paper which is never acted upon is not putting a thing in force. The correspondence to which attention has been called by my learned friend Sir Charles Russell, shows that from the very earliest time instructionswere sent to the Russian cruisers not to act upon the Ukase. I do not want to go into that further because I think it is in your mind. You remember, Sir, that it was stated — Sir Charles Russell read it more than once, I know — that the Ukase is practically suspended; that is to say from 1821. That is Mr George Canning's letter.

The President. — That is what you call no exercise.

Sir Richard Webster. — No exercise.

The President. — Perhaps it would be better to call it no assertion.

Sir Richard Webster. — I was not referring to assertion; There is I submit no meaning in recognition and concession of an assertion. You recognize and concede the right. Of course you recognize that the assertion has been made. A man says, " I possess those fields " Of course you recognize his assertion the moment it is made; but...

The President. — I did not say that England recognized it; but perhaps a refusal of recognizing clashed with a pre-existing state of right or of assertion.

Sir Richard Webster. — I must make my answer clear to you, Sir. I assert that before 1821 there is no instance of exercise at all; nor, for the matter of that, is there any assertion at all.

The President. — I think we know about what went on at that time; that is as to the facts with which you are concerned, I mean.

Sir Richard Webster. — I call your attention to the fact that from 1799 right away up to 1821 British vessels and American vessels were navigating and were trading in the waters affected by the Ukase; and more than that I called attention yesterday to the fact that Russia justified the making of the Ukase on the ground that the trade of the Russian — American Company was interfered with by foreign traders. I need only to remind you of it, Mr President. My contention is that before 1821 there was neither assertion nor exercise by Russia; that in 1821 there was assertion, withdrawn in 1824-25 at the instance of the two countries, evidenced by the signing of the Treaties; that after 1821 there never was an exercise by Russia at any time.

Mr Justice Harlan. — You mean to say there was an assertion in 1812 to the extent of 100 Italian miles from the coast?

Sir Richard Webster. — Or further, if it means further : it is not for me to say whether it means that or not — the learned President has been good enough to point out to me that the 100 miles might be merely a limit of their rights. It may be treated as an assertion of a still greater right; but for my purpose it is sufficient to say that there was an assertion of whatever the Ukase contained.

Mr Justice Harlan. — I think the printed documents in both cases agree in fact that it did not assert in 1821 jurisdiction over the open seas, outside of the 100 mile limit.

Sir Richard Webster. — I am bound to say that M. Poletica in his letter says in so many words that the character of the coast and waters is such as to justify them in making it a shut sea and rather puts it as a matter of favour they did not extend their right.

Mr Justice Harlan. — He stated that they could assert it if they cared to do so, but that they did not care to do it.

Sir Richard Webster. — That only involves the meaning of the word " assert " and what may have been meant by it.

I ask your attention for one moment only to make this concluding observation upon this. Supposing that ten years afterwards, we will say, in the year 1831, Russia had been minded to close Behring Sea or to close it down to latitude 51°, on the ground that it was a shut sea. I do not think that, assuming there was no Treaty, what M. Poletica said would be any bar to their attempting to close the sea at that time. I do not think that such a contention as this could be advanced on behalf of either Great Britain or the United States — " You indicated that you were only going to enforce your rights to 100 miles, and that prevents you from enforcing them further. " Had there been no Treaty, to use the language of a lawyer, Russia would not have been estopped from again setting up the case of *mer fermée*. I hope I have answered the question put to me. I have endeavored to do so, but I do not know that I have brought my meaning clearly to the minds of the Court.

The President. — You have done so with great clearness.

Sir Richard Webster. — I thank you. I need not argue again on question 3, " Was the body of water known as Behring Sea included in the phrase ' Pacific Ocean' ". I have argued that at length.

But I must say a word upon question 4. I confess, Mr President, that I admire the courage of those who framed this Case and Counter Case. I must not distribute the merit too much; but I think General Forster may claim a great part of the merit of the Case. But there is almost an amusing incident in connection with this fourth question.

The fourth question is whether the rights of Russia pass unimpaired to the United States; " Did not all the rights of Russia as to jurisdiction of the seal fisheries in Behring Sea east of the water boundary in the Treaty pass unimpaired to the United States?" Of course they did. There is no doubt about it, Sir. But that is not the way in which the question is attempted to be interpreted by my learned friends when they framed their case. As Lord Salisbury pointed out, and as they in their case remind us, Lord Salisbury said it was no part of Great Britain's contention that the United States did not get all the rights that Russia had. The question was what rights had Russia asserted and exercised. But that is not sufficient for the United States. True to their instincts

they desire to press it a little further; and on page 70 of the United States Case occurs a very remarkable statement : —

" On March 30, 1867 the Governments of the United States and Russia celebrated a treaty whereby all the possessions of Russia on the American continent and in the waters of Behring Sea were ceded and transferred to the United States. This treaty, which, prior to its final consummation, had been discussed in the Senate of the United States and by the press, was an assertion by two great nations that Russia had heretofore claimed the ownership of Behring Sea, and that she had now ceded a portion of it to the United States; and to this assertion no objection is ever known to have been made. "

Sir, there is a very great deal of meaning in that word " ownership ". I cannot help thinking that the very clever gentleman who drew this Case, thought that it might be prudent even still to keep open the question of *mare clausum*. The occasion might arise when the question of the position of the waters would be important. But what does " ownership " mean; because I am entitled to look at this, as matter of substance. The argument is this, Sir : The great nations, two of the greatest on earth, the United States and Russia, are making a bargain. That bargain is declaratory of some rights, and among others, the ownership in Behring Sea, and you, the other nations of the earth, — have objected to it. You have to come and make your objection, or otherwise it will be treated against you as a public assertion that Russia claimed the ownership of Behring Sea. What does it mean? I think, Mr President, with your known experience in diplomatic matters, if you had had your attention called to that clause before I read it, you would have been a little startled, if you had been the representative of France, of your nation, or if the Marquis, as the representative of Italy, or Mr Gram had happened to be the representative of Norway, and had been told that you had conceded the ownership of Behring Sea to Russia, and through Russia, of a portion of it to the United States, because you did not object to the Treaty. I may be wrong. It may be an accidental statement; but I confess, knowing what was passing, knowing some of the other paragraphs in this Case, it was meant to be used as an admission of ownership, in the sense of a right to the waters, on the sea as well as territorial. It is very curious that on page 72 they make use in this connection of Lord Salisbury's very candid statement :

The conclusion is irresistible from a mere reading of this instrument that all the rights of Russia as to jurisdiction and as to the sealeries in Behring Sea east of the water boundary fixed by the treaty of March 30, 1867, passed unimpaired to the United States under that treaty. In fact, the British Government has announced its readiness to accept this conclusion without dispute.

That is perfectly true, and I do not go back from that in any way. I should not be entitled to, and I do not; but that is a very different thing to a statement made that the two nations were asserting ownership in Behring Sea, and that the world is bound by it.

There is no difference in this matter, Mr President, between Spain

and France and Great Britain and China and Japan. All these nations, if this is a declaration of ownership, are bound by it—a declaration of ownership in the sense of meaning that the waters belonged originally to Russia, and now belonged to the two countries. But will you kindly look at the Treaty, sir? Does the Treaty permit of such a contention? Again we find that the most ordinary and proper language, has, for the purpose of the necessities of the United States Case, been construed as conveying a great deal more than to an ordinary reader they would be thought to convey. I read from page 43 of the United States Appendix, Volume I; and I will take the English version, which is what Mr Foster tells me is to be regarded as an original document, and I will not in any way attempt to complicate the matter by an examination of the French :

The United States of America and His Majesty the Emperor of all the Russias, being desirous of strengthening, if possible, the good understanding which exists between them, have, for that purpose, appointed as their plenipotentiaries : the President of the United States, William H. Seward, Secretary of State; and His Majesty the Emperor of all the Russias, the Privy Counsellor, Edward de Stoeckl, his Envoy Extraordinary, and Minister Plenipotentiary to the United States.

And the said plenipotentiaries having exchanged their full powers, which were found to be in due form, have agreed upon and signed the following articles :

ARTICLE I.

His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit :

That, Sir, does not look like an intention of Russia to sell the ownership of the waters of Behring Sea; and, mark you, Mr. President, if there is anything in this point, Russia has parted with the ownership whatever it may mean, of the waters, in the sense of excluding herself. If there are to be any exclusive rights given to the United States by this Treaty, it is not a question of Great Britain alone, and the other Powers, but it is a question also of Russia.

Then the line is set out. That line, Mr. President, is our old line of demarcation, running along the *lisière*, and up to the 141st parallel of longitude. Then the western line of boundary is thus defined : —

The western limit within which the territories and dominion conveyed are contained, passes through a point in Behring's Straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest, through Behring's Straits and Behring Sea, so as to pass midway between the northwest point of the island of St Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of

Attou and the Copper Island of the Komandorski couplet or group in the North Pacific Ocean.

It is quite clear, Sir, that they thought the Komandorski group was in the North Pacific Ocean when this Treaty was made :

To the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Komandorski couplet or group in the North Pacific Ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian.

Would you let me run the pointer along that line, Mr President? It goes over 20 degrees of latitude, right up to the North Pole. They have got all the islands on the right hand side of that line. If there are islands on the east of that line whatever they are, the United States have got them. Do they contend that the ownership of these seas was bargained for, publicly bought and sold, at auction, put up by Russia and sold to the United States, the highest bidder; and, to use their own expression : — " No objection was ever known to be made to this assertion of ownership of Behring Sea by Russia. "

Well, Mr President, if my friend, Mr Foster, will permit me to say so, it looks as if he had in his mind that it might be well not to close the door too much against *mare clausum*, in the event of it being able to hold water. That is not a very good expression for *mare clausum*, I suppose. There must be some way out. But still, in the event of the argument being able to be supported, it was rather prudent to allow that assertion of *mare clausum* to remain on the face of this case.

When you come to look at it from a common sense point of view, Mr President, what is it? The islands in the east of the Sea are unknown. Many of them were not named. The number of them was not known. It was desirable that there should be no contention as to which island belonged to Russia and which belonged to the United States; and accordingly they say, all the islands east of that line—when I say east, I mean east in a general way, south and east of that line, on the right hand side of the line looking north—belonged to the United States. All the islands on the west, to the left hand side of that line, looking north, belonged to Russia. That is the extent, Sir, to which dominion over the seas was asserted. And I say again that it would be a sad thing for diplomacy, and a sad thing in the interest of the peace of this world if nations could create title for themselves by entering into a document of that kind, and then say " You did not make objection to it ", when no reasonable being reading that Treaty, either in the French or in the English, would have drawn any other conclusion from it than that the islands and the territories on the right hand side belonged to one Power, and the islands and territories on the left hand side belonged to another Power.

Sir, Mr Senator Morgan made an observation many days ago in this

case that really points to the significance of the observations that I am making. He indicated that there had been cases in which, as between themselves, nations had agreed to make certain parts of the ocean territorial waters, and as between the United States and Russia, if they had agreed between them that for the purposes of their respective nationals the eastern side should be United States territorial waters, and the western side should be Russian territorial waters, no objection could be made at all so far as their nationals were concerned. That has been done in other parts of the world, as matter of contract. For example, Great Britain has agreed that the fishermen of France should have exclusive rights at certain distances from the French coast, and so France has agreed with regard to English fishermen, and so on, in other parts of the world. Therefore, in the point of view of a mere contract, it would have had no effect as regards other nations. But to suggest that a document which upon the face of it was framed in this reasonable and proper manner in order to avoid dispute in regard to territory is to be regarded as an assertion of ownership and a claim by Russia of ownership of Behring Sea, which all the nations of the world interested in the matter are supposed to have conceded, is pressing the matter rather far.

Senator Morgan. — The case that I had the honor of referring to on that occasion was a Treaty agreement between the United States and Great Britain for the division of the Straits of Fuca, which are in the North Pacific Ocean, an open sea, and where the lines of demarcation between the two countries is sometimes 50 miles away from the shore, and never as close to the shore as 6 miles.

Sir Richard Webster. — Mr Senator, I think your recollection is a little inaccurate. But really, from the point of view I am contending for, I do not desire even to criticise what you have said. I only desire to say that the observation having fallen from you, I endeavoured to make myself acquainted with the matter. The Treaty you referred to is the Treaty of Washington, of 1846, which provided :

" That the 49th parallel should be the international boundary between the United States and British North America, from the Rocky Mountains to the middle of the channel which separates the continent from Vancouver Island. The following is the text of Article one of said Treaty :

" From the point on the 49th parallel of north latitude where the boundary laid down in existing treatries and conventions between Great Britain and the United States terminates, the line of boundary between the territories of Her Britannic Majesty and those of the United States shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver Island; and,then southerly through the middle of the said channel of Fuca Straits, to the Pacific Ocean : provided, however, that the navigation of the whole of the said channel and straits south of the 49th parallel of north latitude remain free and open to both parties. "

I do not know whether I have read it absolutely corectly. It has been extracted for me from the Treaty.

Senator Morgan. — That is right.

Sir Richard Webster. — I ought to mention that there was a subsequent dispute as to what channel was meant. That was referred to His Majesty William I Emperor of Germany, who made an award with regard to the actual lines of the channel.

I should have thought it very doubtful — but of course I speak with great deference — whether the description given by the Senator as to this being clearly non-territorial waters was quite sound. Here is the map. Perhaps, Mr President, you will take it before you. I remember it well enough. Remembering that which is undoubted, that many of the fiords of Norway and Sweden running up into the country for a great many miles, have been regarded as inland waters, embayed waters, I should have thought it very doubtful whether against other nations there was not what was regarded as territorial waters belonging either to one country or two countries, according as there might be one or two. But for my purpose, I really do not care to discuss it. I think you will find, Mr President, that the Southern Boundary is Cape Flattery; there is a lighthouse there; and I am told that the widest place across is 40 miles, but it really makes no difference to my argument. I will take it from the Senator if he says I am wrong. In various places it is less, and in various places it runs up to 40 miles. It runs a very long way up into the land, Mr President. From my recollection I should think it would be some hundred miles, at least.

What happened was this : that Great Britain and the United States agreed that there should be a boundary line between those nations, and that the navigation, as I read just now, should be left open. Has that any bearing whatever upon the question of what I may call international law with regard to the high seas?

Sir, if, as I have said, more than once today, the courage and convictions of the Senator had inspired the minds of those who framed the Case, and they had nailed their colors to the mast, and had brought up *mare clausum* in this Tribunal, I think that possibly then, a very slight argument might have been founded upon the Straits of Fuca Treaty; but I confess when *mare clausum* has been repudiated and scoffed at by my learned friends on the other side, I do not think they can get much argument in favor of their contention. Two great countries desiring to settle matters amicably agree as between their two possessions that the boundary of their territories should be a certain channel and a certain meridian.

As a matter of fact, sir, it was a case very parallel to the 1867 agreement. There were a large number of islands at the eastern end of that map. When you go towards the right hand end of the channel or the eastern end of the straits there are a very large number of islands. I think that map has the award line upon it, Mr President. There was a discussion as to which channel was meant and the only effect of the treaty for our purpose was again to determine whether the islands upon one

side of the channel should be British and the islands on the other side of the channel should belong to the United States.

Senator Morgan. — You cannot abrogate the three mile limit.

Sir Richard Webster. — That is so.

Senator Morgan. — I merely mention this, Sir Richard — that in places the shores are 40 miles away from each other, and that has been considered the open sea ever since the discovery of the country, that is the place where pelagic hunting of seal was first practised and to which they resort now. It is a proper consideration for this Tribunal, I think, whether the parties have made it so by their pleadings or not. As suggested by the President of the Tribunal, it is a proper consideration as to whether that is not a part of the open sea which has been disposed of by two countries who claim the right to abrogate the three mile limit and claim the property on either side of the line in the open sea.

Sir Richard Webster. — Well, Mr Senator, it may have a bearing on the argument. If I could see it I would try and appreciate it, and if I could appreciate it I would deal with it; but answering your question to the best of my ability, I am unable at present to say that what might be called the three mile limit is abrogated in the section; but even if it were it would amount to nothing more than that as between those two nations, and as to that particular place, there should be a conventional line of division and a conventional line of territorial waters.

But may I be permitted for a moment to say that the point about that line was not the question of the right side or the left side, the starboard hand or the port hand of the line that went up and down the channel. It was the islands up at the eastern end; and that is shown by the subsequent discussion. Unfortunately the clever men who framed that treaty thought they did understood what the channel meant. It turned out they did not and accordingly the United States claimed a great many more islands than Great Britain thought they were entitled to. The Emperor of Germany made an award, laying down that line, the result of which was that the islands on the right hand looking up passed to the United States, and the islands on the left hand passed to Great Britain.

Senator Morgan. — You remember that the proviso in Article I of that Treaty does not reserve the right of fishing.

Sir Richard Webster. — What if it does or not? I am not sufficiently acquainted with the facts to say if the inference you draw is correct but I do say there is nothing in it which militates against my argument.

Senator Morgan. — Perhaps not. I wanted to bring it forward as a division between two nations who claimed the soil on both sides of the Strait.

Sir Richard Webster. — I do not happen to have before me what you said with regard to the existence of this Treaty, but I desire to point out this, that if the United States were claiming that the 1867 Treaty was to be regarded as being a division between the United States and Russia of the waters of Behring Sea in the same sense you were conten-

ding, it is possible there might be some analogy on the ground that those two nations meant to make it territorial waters; but unless the meaning is to be imputed to that word "ownership" on page 70 which the United States Case seems to indicate it would not be a parallel case.

Senator Morgan. — I only cite it with the view of showing that this assumed doctrine of the 3 mile territorial limit said to be laid down and established by the law of nations is a doctrine which has been buffeted and kicked about by all the nations of this world according to their convenience.

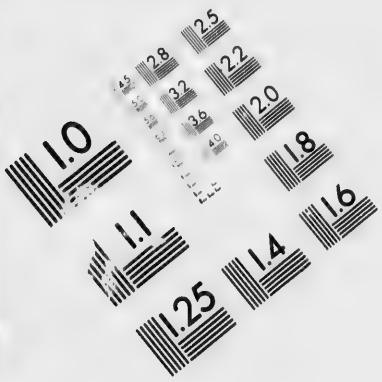
Sir Richard Webster. — Well, Sir, I do not know whether that argument finds favour with my learned friends, but I respectfully submit to you that the fact that a Treaty has been made varying the 3 mile limit as between themselves is neither a "buffet" nor a "kick" nor a "pouring of contempt or scorn" upon it; on the contrary, it is a recognition of there being a rule of that kind for the variation of it is to be by Treaty, and, so far from it affording an argument against me, it is an argument in my favour, because it was necessary that there should be a contractual arrangement between Great Britain and the United States to get rid of the disputed doctrine.

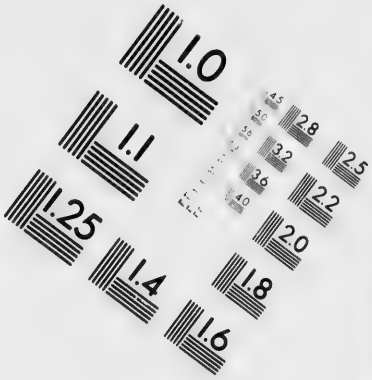
I hope I have not done wrong in calling attention to that matter because it seems to me to afford if anything an argument in our favour and not in favour of my learned friends.

Senator Morgan. — Personally I feel very much obliged to you for your suggestion.

Sir Richard Webster. — I am glad to be able to say except with regard to one or two general considerations affecting these first four questions, I believe I have substantially finished what I have to say about the first four questions, and I shall be able to devote myself soon after the commencement of the proceedings to-morrow to the consideration of the fifth question.

(The Tribunal then adjourned till to-morrow at 11-30.)





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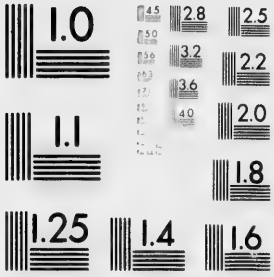

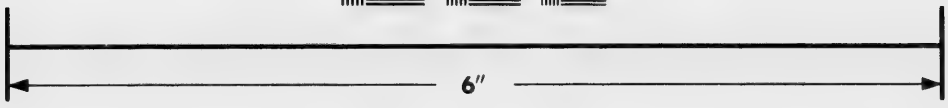

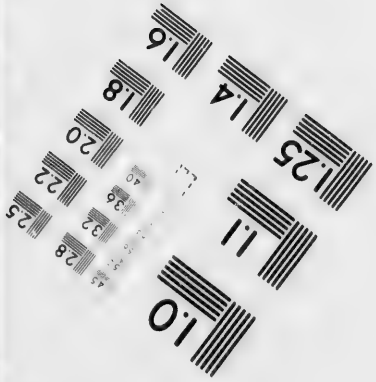

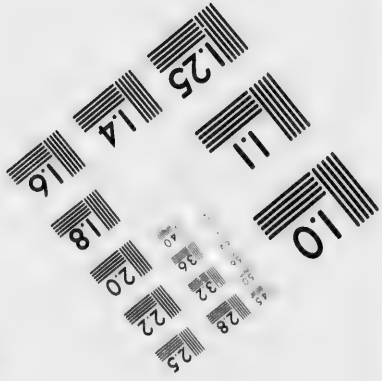

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Sir Richard Webster. — Mr President, when we broke up yesterday, I was dealing with the Juan de Fuca Treaty; and I find that I made a mistake against myself of an important character, which I had better put right at once. I spoke of the entrance to those Straits as being 30 or 40 miles wide. I had not the Chart before me; the only copy I had, I had lent to the Tribunal and I find I was inaccurate because the width is rather over 10 miles, — 10 1/2 miles wide — where the light is; and that extends for no less than 50 miles wide into the country. It is not for me to suggest what the Tribunal might decide; but all I can say is, having regard to decisions which are well known to me, I submit to you that there is no doubt those would be regarded as being enclosed and interior waters, as to which, quite apart from convention, many nations might consider they had rights of dominion.

I will merely mention one or two instances which have come under my notice in the course of reading this case. One set of instances has been mentioned by one of the Members of the Tribunal with regard to Norway. There are fiords in Norway, of varying widths at the mouth, which run up for 100 miles or so into the country. The question depends on the configuration of the country, the land enclosing them on both sides; and for many purposes, if not for all, those would be regarded as interior waters.

Then, the question arose in Great Britain as to the Bristol Channel at a point where it was 17 or 18 miles wide, which formed the discussion in a Criminal Court whether the crime of murder committed on board a vessel in the Bristol Channel was within the jurisdiction of the Assize Courts, which have only jurisdiction in the body of the county. There the Court of Crown Cases Reserved, which is the highest Court that we have in England in regard to criminal matters, decided that that space was within the body of the country, Lord Chief Justice Cockburn, I remember, delivering the judgment in the matter.

The President. — Was that before your law about territorial waters?

Sir Richard Webster. — Yes that was before the territorial waters law, and it marks the distinction that when the question of territorial waters arose in the *Queen* v. *Keyn* they were dealing with a three mile belt in the English Channel. I happen to know from having been engaged in the litigation between the "Franconia" and the "Strathclyde", that the "Franconia" was a German ship of which Keyn was the Captain, and when passing through the Channel she came into collision with the "Strathclyde" within the three mile limit. A question arose on a charge of manslaughter

brought against the Captain on the ground of the death of a passenger, there having been negligent navigation of the " Franconia, " the negligent navigation not being disputed; it was decided for the purpose of that criminal jurisdiction that the three mile belt did not give the court jurisdiction, and in consequence of that the Territorial Waters Act was passed.

The President. — That was a matter of domestic legislation.

Sir Richard Webster. — Entirely; but before that Act with reference to what I call the embayed and enclosed waters of the Bristol Channel, the question would depend upon the common law principle, and the principle of international law, that enclosed and embayed waters may become part of the dominion of the particular country; and I say with great respect to any argument that may be addressed on the other side, I do not think that my learned friends will find any authority to suggest that the waters in such a place as that shown on the chart, between ten and eleven miles wide at the mouth, extending 50 miles into the country, would not be regarded as otherwise than inland, embayed or enclosed waters. And the fact that they widen out to 35 miles among the islands would not remove that presumption. Of course, I do not withdraw the argument that I addressed to the Tribunal yesterday on the Treaty. The real object of that line was to determine to which nation the particular islands belonged on the one side and the other of the line laid down.

I was going to mention that a similar question arose with regard to Passamaquoddy Bay in the Bay of Fundy, and there are three or four cases where similar views have been adopted where the question turned upon the configuration of the land, the degree to which the sea was enclosed, and exactly the same considerations, Mr President, as M. de Poletica had in his mind when, in that passage to which you called my attention yesterday he thought fit to say, erroneously it must now be admitted, the whole Pacific Ocean down to latitude 51° on the coast of the United States and of America, and latitude 47°, on the coast of Asia, had all the characteristics of shut seas and *mers fermées*.

The President. — Before you leave that subject, Sir Richard, I think it is my duty as the President of an International Tribunal, as this is, to remind you of the suggested distinction which you made and which you must keep to, between jurisdiction as it is fixed by internal law and international law — what may be and ought to be considered as international law. I perfectly admit that in such instances as this strait of Juan de Fuca and also in the case of the Norwegian fiords, that any nation, as far as it concerns its own nationals, has a right to fix the limits of her jurisdiction. That, I believe, everyone who has studied international law and every lawyer who is competent on the question, will admit. As to the international validity of such a pretension, that is another question, and I believe that we must stick to the point that it is a question in each particular case how far the general assent of particular seafaring nations may go. That is an open question, and may be solved dif-

ferently, not only in different cases, but in different times. It may account for the ancient pretensions put forward by Great Britain in the time of Selden, which the Russians seem to have put forward as regards the Behring Sea in the time of M. de Poletica. It may account also for your explanation of the Treaty, which is also an explanation of Mr Senator Morgan, between the United States and Great Britain as concerns the straits of Juan de Fuca. I myself will ask you not to accept any definite opinion about it, and I put my own reservation forward, inasmuch as I do not know how far this necessary regard of other nations may go. I will say, with all due respect for my very learned colleague Mr Gram, that I would give it as an answer concerning the fiords of Norway. I find nothing incompatible with the extension of a three-mile limit principle to a larger extent, if and when the assent of other nations is secured. That is a question of fact; that is a question of tradition; that is a question open to examination. Under those reservations, I will ask you to proceed.

Sir Richard Webster. — May I remind you, Sir, that what you have indicated is exactly in accordance with the view I ventured to present yesterday, and which the Attornay General presented, that the arrangement made by treaty between these two nations, the United States and Great Britain, in this case, would not in any way preclude other nations from contending that the terms of the agreement were not binding on other nations; but that other nations could contend they were waters of the high sea, and it would be a question, as far as other nations being bound, either of acquiescence and assent, or of the configuration of the land round the waters being such as, applying to the argument the principles of international law, they are to be regarded as being inland sea.

Senator Morgan. — In order that another authority or citation of an instance may be examined by counsel on both sides, I desire to call attention to the action of Great Britain, the United States, the Netherlands, and France, in 1862 or 1863, in going to war with Japan and compelling her to admit merchant-ships to pass through the Straits of Shimonoseki. There, one of the feudal Princes, Prince of Negato, had fortified a pass through the Straits of Shimonoseki, which was not more than a mile and a half wide, and stationed three ships-of-war there, and the United States Government, leading off in one year, the British Government followed it the next, they succeeded in bringing Japan to terms, and compelling her to admit that that was part of the open sea. Four great nations were concerned in forcing her to admit that that strait, a mile and a half wide, was open sea.

Sir Richard Webster. — I will gladly examine into that matter; but I would answer at once that the reply seems obvious. It is clear, whatever may have been the question of legal rights, the nations though fit to enforce their claims by power, and not by the exercise of any legal rights. And I rather think it will be found the cause of the war, so far as Great Britain was concerned, was an actual attack on some of her vessels.

Senator Morgan. — Yes. She claimed the ancient right to pass through as part of the high seas. That is all.

Sir Richard Webster. — Now, I should like to pass from the subject if I may by reminding you that in a very celebrated case of Conception Bay, which formed the subject of discussion in the Privy Council, and is reported in our Law Reports, (in the 2nd volume of Appeal Cases, at page 420), the ground of the judgment as to the right to regard these waters and this bay as interior waters was put upon the acquiescence by other nations, and, therefore, that has been, as you most properly pointed out, one of the principal things to be considered in connection with any extension of territorial rights either in a particular locality or in the question of the general marginal belt which is to be regarded as being territorial waters, near to the shores of a country.

The President. — I am very happy to think that this question of the definition of « territorial waters » does not altogether lie before us. I know that it has given a great deal of trouble some 60 years ago in the case of the Plate River which was also a difficult instance to know where the open sea ends and the interior water begins. There are many difficult instances of that sort; but I believe the general principle is the general assent of seafaring nations.

Sir Richard Webster. — Mr President, as I said yesterday, in substance I had concluded all I desired to say on the four questions first enumerated in Article VI because you will remember my criticism or my argument upon them in connection with the Juan de Fuca Treaty, arose out of the passage in the Counter Case and the Case to which I called attention, where the Treaty of 1867 was dealt with; and, practically speaking, I am almost in a position to pass to question 5.

One topic only I wish to notice before doing so. It is suggested more than once, in the United States Case and Counter Case, that whatever may have been the rights on the legal position with regard to these first four questions, the United States in purchasing Alaska had the seal industry in view, had the Pribilof Islands in view, and that that induced them to give the sum of seven million dollars for that territory.

Sir, I desire to make a perfectly frank admission — that from the point of view of the legal rights of the United States, it makes no difference at all whether they knew of the Pribilof Islands, or did not; whether they knew of the fur-industry, or did not; and I admit their rights are as great and as large — that it strengthens my argument in no respect to show that they were ignorant either of the Pribilof Islands, the value of the fur-industry, or anything else. But it is at any rate right that I should, in a very few sentences, point out to this Tribunal, that the allegations contained in the United States Case, and the Counter Case, are not well founded, because it then removes from the claim of the United States what I may call some cause of equitable complaint, which otherwise might be supposed to be allowed to be invoked in their favor.

The first of the two passages to which I refer will be found on page 74 of the Case of the United States speaking of the Pribiloff Islands and the fur trade, in these words : —

> Their value was well known to the American negotiators of the Treaty of 1867, and while it must be admitted that political considerations entered into the negotiations to a certain extent, yet so far as revenue to the Government and immediate profits to its people were concerned, it will appear from a careful study of the incidents attending the transfer of sovereignty that it was the fur industry more than all other considerations which decided the United States to pay the sum of seven million two hundred thousand dollars required by Russia for the cession and transfer of her sovereign rights and property.

Well, Sir, whoever is responsible for the framing of this Case — I must not, of course, speculate — all I can say is, it would have have been more satisfactory to the Tribunal — perhaps, a little fairer to those who had to argue on the other side — if the incidents attending the transfer (the careful study of which will show that it was the value of the fur-industry that induced the United States to pay this price) had been stated. As far as we can gather from the evidence before the Tribunal the incidents are all the other way. I will in a moment call attention to what the evidence is, but in the Counter Case when the whole matter had been discussed by Great Britain in their Case (as I shall show directly) they repeat the allegation in these words.

It is to be found at page 30 of the Counter Case of the United States :

> First. That soon after the discovery by Russia of the Alaskan regions, and at a very early period in her occupancy thereof, she established a fur-seal industry on the Pribilof Islands and annually killed a portion of the herd frequenting those islands for her own profit and for the purposes of commerce with the world; that she carried on, cherished, and protected this industry by all necessary means, whether on land or at sea, throughout the whole period of her occupancy and down to the cession to the United States in 1867; and that the acquisition of it was one of the principal motives which animated the United States in making the purchase of Alaska.

Mr President, for a few moments, and for a few moments only, I will show you upon the evidence that neither of those allegations is well founded, and from the point of view of equitable claim to have the so-called industry protected on the ground of their having considered it in the price, the evidence does not support the contention of the United States. Of course, one obvious comment arises at once, and that is this : it is a remarkable thing, if they had this knowledge, that for a year and a half if not for two years, they permitted the wholesale slaughter which, according to their own statement, and perfectly fair statement, to-day, was extremely detrimental to the United States. But I am not going to rely upon negative matters at all. I am going to rely upon positive and affirmative testimony with regard to this matter. I will call attention first, Mr President, to page 70 of the British Counter Case. The United States without mentioning any date had referred at pages 75 and 76 of their Case to a Congressional Committee which sat in they year 1888. They do not mention the date, but it is the fact that it sat in the year 1888.

Mr Justice Harlan. — 1888?

Sir Richard Webster.—1888; and that Committee is referred to as if it was of a much earlier date, but I have no doubt that was by inadvertence. The report of that Committee will be found on page 86.

General Foster. — It states the date. There is no inadvertence about it.

Sir Richard Webster.. — With deference, it does not.

General Foster. — At the bottom of page 77, it says it was the 50th Congress.

Sir Richard Webster. — I beg General Foster's pardon. I have not such an intimate acquaintance as General Foster with these dates, and I do not suppose many members of the Tribunal have.

The President. — What date would that be?

Sir Richard Webster. — 1888, but I merely make the observation in passing, that to anybody reading the Case there is nothing to show that the transition at the bottom of page 75 from the period of 1867, refers to as late a date as 1888. On page 75 they refer to it in this way, after referring to Mr Sumner's speech in 1867.

> The Congressional Committee, after making various quotations from official and other sources, further states : It seems to the committee to have been taken for granted that by the purchase of Alaska —

The Tribunal will kindly note this.

> the United States would acquire exclusive ownership of and jurisdiction over Behring Sea, including its products.

If that is anything, that is *mare clausum*. Then it goes on :

> The fur-seal, sea-otter, walrus, whale, codfish, salmon, and other fisheries; for it is on account of these valuable products that the appropriation of the purchase money was urged.

Will you kindly note that the Congressional Committee so far even, from its report in 1888, supporting the statement that it was principally the fur-seals, say that it was :

> Exclusive ownership of and jurisdiction over Behring Sea, including its products - - the fur-seal, sea otter walrus, whale, codfish, salmon, and other fisheries.

Then it goes on :

> The extracts above quoted in reference to these products are emphasized by the fact that the fur-seal fisheries alone have already yielded to the Government a return greater than the entir : cost of the territory
>
> It seems clear to the committee that if the waters of Behring Sea were the "high seas " these products were as free to our fishermen and seal hunters as the Russians, and there was, therefore, no reason on that account for the purchase. But it was well understood that Russia controlled these waters; that her ships of war patrolled them, and seized and confiscated foreign vessels which violated the regulations she had prescribed concerning them; and the argument in favor of the purchase was that by the transfer of the mainland, islands, and waters of Alaska we would acquire these valuable products and the right to protect them.

Again I note the evidence upon which the Congressional Committee

was led to the belief that Russia had controlled the waters, and seized and confiscated vessels, and that they were going to get the ownership and jurisdiction over Behring Sea, does not appear. But having called attention to the Report of the Committee of 1888, of course at a time when the case was jurisdiction over Behring Sea and nothing else — when this idea of defensive regulations had not occurred to the fertile imagination of anybody — that report of the Committee having been referred to at page 70 of the Counter Case to which I was directing your attention, you will find what the contemporary evidence is. I read now from page 70 :

> No reference is made in the United States' Case to the report of any previous Committee of Congress. Such reports, however, exist, and are of a directly opposite tendency.

Now I read from the Report of the Foreign Affairs Committee in 1876. That, Mr President, as you will remember, is one year after the purchase.

Senator Morgan. — Which House was that?

Sir Richard Webster. — It does not say, Sir, but I will get it from the history of Alaska. At page 70 of the British Counter Case, you will find this :

> "The motives which led the United States' Government to purchase them [Russia's American possessions] "are thus stated in a report of the committee on foreign affairs published 18th May, 1868 : 'They were, first, the laudable desire of citizens of the Pacific coast to share in the prolific fisheries of the oceans, seas, bays, and rivers of the Western World; the refusal of Russia to renew the Charter of the Russia-American Fur Company in 1866; the friendship of Russia for the United States; the necessity of preventing the transfer, by any possible chance, of the north-west coast of America to an unfriendly Power."

I wonder whether that Committee thought that North-west coast meant from 60° down to 54°! It goes on :

> The creation of new industrial interests on the Pacific necessary to the supremacy of our empire on the sea and land; and finally, to facilitate and secure the advantages of an unlimited American commerce with the friendly Powers of Japan and China.

I pass the reference here to Mr Elliott. I shall have to refer to that later on and show that he was absolutely right; but I pass from that for the moment, as I do not want to argue on any contested matter. I am taking the reports from the official sources of the United States which are not suggested in any shape or way to be otherwise than worthy of credit. I call attention to the report of the evidence of Mr Williams before that Committee of Congress to which reference has been made. It is quoted on page 72. He said :

> I do not think, when the Government made the purchase from Russia, that any one outside of a dozen people, perhaps, who had been acquainted with sealing heretofore, had the slightest knowledge of there being any value in those islands, or that the Government was going to get anything of value outside the mainland of Alaska.

And, then, Mr President, upon the suggestion that the value to the Government enhanced the price they were willing to pay, let me read an extract from the evidence of Dr Dall, a gentleman who (as I shall shew at another stage of this case), has been more than once referred to by the United States, and whose evidence is used on other points; but I will read, merely for this purpose, the extract set out at page 73 :

> I said that in 1866 (not 'in the early days of the industry') I purchased first-class fur-seal skins at 12 1/2 cents a-piece, that being the price at which they were sold by the Russians. The point of this observation lies in its application to the oft-repeated statement that, as Mr Palmer says, 'little stress was laid upon the fact that fur-seals were found in abundance' at the time of the purchase of the Territory by the United States. No stress could reasonably have been laid upon it, since 100,000 seals would at that time have been worth only some 12,500 dollars, which would hardly have paid for the trouble of taking them. Of course, almost immediately afterwards this was no longer true.

Now, Sir, I said yesterday, and I venture to repeat the observation to-day, this is a Tribunal in which, although the rules of evidence are properly extremely free, liberal and lax, yet still the assertion of Counsel, the assertion of Agents in the case, go for nothing unless there is evidence to suppor them; and I submit to this Tribunal that it is not in any way proved, — not only is it not proved, but I have shown evidence before this Tribunal which, speaking of contemporary utterances, — speaking of contemporary documents, — shows that the United States did not in any way regard either the Pribilof Islands or the fur-industry as bearing upon the question of price which they were willing to pay.

The President. — Perhaps, in reference to this last quotation from Dr Dall, do you not think that perhaps the low price paid for fur-seal skins would have been owing to the circumstance that fur-seals were not yet hunted in that time, and that sea-otters were more likely to have been hunted?

Sir Richard Webster. — I think that is highly probable.

The President. — And those had but a small value.

Sir Richard Webster. — It strengthens my remark. I am not on the question of what the *cause* was; I am on the question of fact, that the allegation that the United States were being hardly dealt with because they paid for this a high price, is unfounded on the facts of history, and upon the facts which are before the Court. Now, let me pass from that.

Mr Justice Harlan. — Did not Mr Sumner in his speech refer to the immense number of fur-seals?

Sir Richard Webster. — I should like to be allowed to answer that. — I did not mean to refer to it because it would certainly, to an extent, trespass upon what I may call contentious matter, — certainly not in the sense of enhancing the value of the purchase; but, as I am challenged, I will read the passage.

Mr Justice Harlan. — I do not mean to challenge you, Sir Richard.

Sir Richard Webster. — I beg Judge Harlan's pardon; I did not mean it in that sense.

Mr Justice Harlan. — I think the passage has been read once; and it is not worth while to read it again, unless you want it.

Sir Richard Webster. — The passage to which I was going to refer has not been read. I really should not have troubled about it, but that you were good enough to indicate to me that perhaps my statement might be a little too wide. I do not think it is at all.

The summary of the advantages which is referred to in the citation of Mr Elliott which I did not read (at page 70 of the British Counter Case), is to be found at page 88 of volume 1 of the Appendix to the British Case; and it really does rather point the strength of my observation, although I can assure the learned Judge I did not mean to refer to it again. I had quite sufficient else to say, and I should not have referred to it, but for his calling my attention to it. Mr Sumner had given a very long and elaborate description of all the various industries. He had referred among others (as the learned Judge has reminded me), to the capture of seals, of sea-otter, and of other fur-bearing animals; and then the summary to which Mr Elliott's referred in his passage, — and which it was suggested by the United States Counter Case to be an inaccurate reference, — is in these words.

> Mr President, I now conclude this examination. From a review of the origin of the Treaty, and the general considerations with regard to it, we have passed to an examination of the possessions under different heads, in order to arrive at a knowledge of their character and value; and here we have noticed the existing Government which was found to be nothing but a Fur Company, whose only object is trade; then the population, where a very few Russians and creoles are a scanty fringe to the aboriginal races; then the climate, a ruling influence, with its thermal current of ocean and its eccentric isothermal line, by which the rigours of that coast are tempered to a mildness unknown in the same latitude on the Atlantic side; then the vegetable products, so far as known chief among which are forests of pine and fir waiting for the axe; then the mineral products among which are coal and copper, if not iron, silver, lead, and gold, besides the two great products of New England 'granite and ice'; then the furs including precious skins of the black fox and sea-otter, which originally tempted the settlement, and have remained to this day the exclusive object of pursuit; and lastly, the fisheries, which, in waters superabundant with animal life beyond any of the globe, seem to promise a new commerce to the country. All these I have presented plainly and impartially exhibiting my authorities as I proceeded. I have done little more than hold the scales. If these have inclined on either side it is because reason or testimony on that side was the weightier.

I ask for no stronger testimony in refutation of the allegation that the principal thing that influenced the United States in paying the 7,000,000 of dollars was the fur industry, than that passage from Mr Sumner, who was advocating the purchase before Congress; and to any impartial mind — I lay stress on the observation and I ask criticism upon it — is it not clear that Mr Sumner was expatiating upon the fisheries upon the mineral products, upon timber, upon trade and commerce and, if you like, upon trade in sea-otter and the other animals mentioned, the black fox,

and things of that kind? No candid statesman, as Mr Sumner was, if he meant to say "You are to pay $7,000,000, because the seals from these little dots of Pribiloff Islands are worth it all" — if that had been the main inducement, would have left it out. I was only induced to follow this up, because of the somewhat extravagant allegations in the Case and Counter Case of the United States. I say, let the United States have the benefit of it, only do not let them parade before the Tribunal that they are being deprived of anything for which they paid so many dollars.

Mr Justice Harlan. — On page 79 of that document you will see Mr Sumner goes into details of all the other kinds of animals, stating, among other things: "That from 1787 to 1817 for only a part of which time the Company existed, this Unalaska district yielded upwards of 2,500,000 seal skins", Near the top of page 81, you see he does refer to the seals.

Sir Richard Webster. — I never said the contrary.

Mr Justice Harlan. — I know.

Sir Richard Webster. — My point is that neither the value to Russia, nor the value to the United States of that trade or industry, is suggested or referred to. The fact of that strengthens my point. If I might be permitted simply to argue what seems to me to be the fair result of what you have been good enough to put to me, it strengthens my point; it shows that the knowledge of the capture of those seals was in the mind of Mr Sumner, whatever extent it was, but that as an element of value to the United States it is not enumerated when he is speaking in a summary of what the objects of value were. I might say that the Foreign Committee about which Senator Morgan asked, seems to have been the Foreign Committee of the House of Representatives in 1876.

Senator Morgan. — I am asking this question for information — does the evidence anywhere show that, at the time, a fishery of any description — either a whale fishery or what we call a fur-seal fishery had been established in Behring Sea — a cod fishery or halibut fishery?

Sir Richard Webster. — According to my recollection of the evidence I do not think fisheries had been established, but large quantities of cod and halibut had been caught.

Senator Morgan. — In Behring Sea?

Sir Richard Webster. — In Behring Sea, but not a fishery established in that sense that I know of — vessels going there to fish.

I know of persons catching in Behring Sea large quantities of cod and large quantities of cod close to the Pribilof Islands — that is a matter which I will call attention to when I come to address the Tribunal on the matter of Regulations, but it is nothing to do with my particular point. I believe, Senator as far as my present knowledge goes — I speak subject to correction — there is no evidence of the establishment of what I may call regular trading fisheries of either cod or halibut, in the waters in question.

The President. — You are not aware of any fishermen having claimed against the existence of these fish-devouring animals, the seals?

Sir Richard Webster. — I do not think, beyond the objection made by the Board of Trade of the town, and the important town to which we directed and were happy enough to be enabled to direct the attention of Mr Phelps, — beyond that particular reference to the town of Port Townsend —

Mr Phelps. — Port Townsend.

Sir Richard Webster. — Port Townsend — I will not attempt to follow it up, because Mr Justice Harlan did not want in any way to do otherwise than to see that my argument was not stated in too strong language, but certainly the reference to furs in page 77 speaks of them as having, " at times vied with minerals in value, although the supply is more limited and less permanent ". I cannot help thinking it was a very doubtful element of value — certainly it was not represented an element of value in any document that I am aware of.

Now Mr President, I cannot forbear reminding you, once more, of the position that the committee took up in the year 1888 following out the line which was then the case of the United States, namely, that it was taken for granted that by the purchase of Alaska the United States would acquire exclusive ownership and jurisdiction over Behring Sea. Had they any warrant for saying that was taken for granted? Would the Tribunal kindly oblige me by looking at page 100 of the British Case where, at the very first inception of this matter, before we knew anything that the United States would say except what appeared in the diplomatic correspondence, we pointed out the impossibility of contending that the waters of the Behring Sea were *mare clausum*; and strangely enough to a certain extent, although not directly, it answers Senator Morgan. Mr Sumner referring to whale fishery said —

> The narwhal with his two long tusks of ivory, out of which was made the famous throne of the early Danish kings, belongs to the Frozen Ocean; but he, too, strays into the straits below. As no sea is now *mare clausum*, all these may be pursued by a ship under any flag, except directly on the coast and within its territorial limit. And yet it seems as if the possession of this coast as a commercial base necessarily give to its people peculiar advantages in this pursuit.

Perfectly true, Mr President, as was pointed out in connection with the subject by my learned leader, the Attorney General, when he was pointing out that it was because the possession of the coast in proximity to the fishing with facilities of going and returning, in obtaining food, drying fish and a variety of other things, enables the inhabitants to exercise to a greater extent the privilege that all others enjoyed — that, as Mr Sumner put it with prudence and judgment —

> The possession of this coast as a commercial base must necessarily give to its people peculiar advantages in this dispute.

Then Mr Washburn, of Wisconsin, spoke in this debate — this is the

evidence upon which it is supposed to be taken for granted that it was *mare clausum* — Mr Washburn said : —

But, Sir, there has never been a day since Vitus Behring sighted that coast until the present when the people of all nations have not been allowed to fish there, and to cure fish so far as they can be cured in a country where they have only from forty-five to sixty pleasant days in the whole year.

Then Mr Ferries, speaking in 1868, said : —

That extensive fishing banks exist in these northern seas is quite certain ; but what exclusive title do we get to them? They are said to be far out at sea, and nowhere within 3 marine leagues of the islands or main shore.

Then Mr Peters refers to this and says : —

I believe that all the evidence upon the subject proves the proposition of Alaska's worthlessness to be true. Of course, I would not deny that her cod fisheries, if she has them, would be somewhat valuable ; but it seems doubtful if fish can find sun enough to be cured on her shores, and if even that is so, my friend from Wisconsin (Mr Washburn) shows pretty conclusively that in existing treaties we had that right already.

Then occurs a long reference to Mr Williams which I do not desire to read, because it is only on the same point. But perhaps I had better read the first passage, It is this : —

Or is it the larger tenants of the ocean, the more gigantic game, from the whale, and seal, and walrus, down to the halibut and cod, of which it is intended to open the pursuit to the adventurous fishermen of the Atlantic coast, who are there already in a domain that is free to all?

Here, Mr President, was the time when, if it were true that the motive to be urged upon a reluctant House of Representatives to vote the money was the value of the fur-seal fisheries, and the closed nature of the waters, we should have found the counter-reply. We have nothing of the kind; and I leave this branch of the case with the submission to this Tribunal that neither in law, nor in equity, nor in justice in the higher sense of the word, have the United States people ever acquired from Russia any rights which they are entitled to exercise now, to the exclusion of Great Britain, France, Japan, Russia, and all other countries that choose to send a ship there hunting and fishing for seals upon the high seas; and that the same law with regard to those animals on the high seas, in so far as we are dealing with the first four questions, applies equally in the case of whales, seals, walruses, cod, and numbers of other fish, well-known to my friends, which can be caught, and probably will be caught, in increasing numbers in these waters as the demands of population and the increase of civilization by that cause creates a market for them, and facilities increase for transit of the products when they once have been taken from the deep itself.

I ask the Tribunal now to permit me, at some little length I am afraid, to deal with the contentions of my learned friends Mr Carter and Mr Phelps, supplemented by that of Mr Coudert, on the question of property.

Mr Justice Harlan. — Before you go to that new point, Sir Richard, let me make an enquiry about some documents, You are so familiar with them, that I know you can readily answer me. You remember the two drafts that passed between Great Britain and Russia in respect of the Treaty of 1825?

Sir Richard Webster. — You mean the *projet* and the *contre-projet?*

Mr Justice Harlan. — Yes. It appears from the letter on page 72 (vol. II. Appendix to Brit. Case), of December the 8th, 1824, from Mr George Canning that, he sent to Mr Stratford Canning an amended *projet;* that is one showing such additions and alterations as he would consent to for the guidance of the British Minister at St Petersburgh.

Sir Richard Webster — You meant, that Mr George Canning sent it to Mr Stratford Canning?

Mr Justice Harlan. — Yes; and he had that third *projet* of the British Government in his hands when he concluded the Treaty. I want to enquire if that document appears in the case?

Sir Richard Webster. — Well, I do not think he had it in his hands when he concluded the Treaty, though of course he had it. It is clear the first two Articles were taken from the American Treaty, as I mentioned to you yesterday.

Mr Justice Harlan. — On page 79, Mr Stratford Canning writes to Mr George Canning showing that he had presented this new *projet* to the Russian Minister, and some discussion arose about it.

Sir Richard Webster. — I have never seen it, and I do not think that that third document, as you very properly called it, being a modification of the Russian *projet*, appears in the papers. We have no means of access to anything else except what is here.

General Foster. — I would like to suggest that my attention was not brought to that reference till it was too late, under the Treaty, to make an application for it; and it shows it accompanied it, and it was an oversight of ours in not applying for it.

Sir Richard Webster. — If General Foster desires the document, and it is in our possession, he shall have it. We have never raised any question of time; and I may be allowed to say that General Foster has never asked for the document, or expressed a wish to have it, though there are other documents that he has had quite independently of any question of time. Of course, I make no grievance about it; but if General Foster says he would like it looked for, it shall be looked for. My answer to the Judge was that I did not think it was in the papers. I have never seen it; and, more than that, my attention has not been called to it till this moment.

Mr Justice Harlan. — I followed your argument yesterday very closely, and I took these papers home last night, and studied them carefully, and my attention was called to it then for the first time. That was the reason I asked the question.

General Foster. — I may say that I express a most earnest desire to see it now.

Sir Richard Webster. — If General Foster had given us the slightest indication, we should have endeavoured to get it.

Mr Tupper informs me that a search was made, and it could not be found. As far as I am concerned, I should be only too glad to have it, because. I know nothing more than what appears in the papers now.

The President. — It may be in the Foreign Office in London, or in St Petersburgh.

Sir Richard Webster. — I will make a further enquiry about it. As far as I know, it can only support the contention I urge before you. Mr Tupper had better state to the Tribunal himself what he knows about it.

The President. — Certainly.

Mr Tupper. — I may say, Mr President, that that document seemed to me to be of importance; and, during the preparation of the Case, I made enquiries at the Foreign Office in London. A search was made there, and, if my memory serves me right, and my memory is confirmed for the moment by Mr Maxwell of the British Staff here, an enquiry was also made at St Petersburgh for the same document; but our efforts were unsuccessful.

Sir Richard Webster. — We have conducted this case hitherto on perfectly friendly terms; and I hope the Tribunal will understand that the interruption by General Foster, which is quite fair enough, that he would like to see this document was the first intimation, as far as we know, of his having a wish on the matter. We should, of course, if we had had it, have had the document with our papers.

Mr Justice Harlan. — Then, on page 41 of the same volume, referring to the settlement of Sitka before the Treaty, Sir Charles Bagot says it,

> is not laid down very precisely in the map published in 1802 in the Quarter-master-General's Department here, or laid down at all in that of Arrowsmith, which has been furnished to me from the Foreign Office.

I find, among the maps, a copy of this map of 1802, and I wanted to enquire if a copy of the map of Arrowsmith is in the case anywhere? I see from your list, there was one of Arrowsmith.

Sir Richard Webster. — I referred to it yesterday.

Mr Justice Harlan. — It was published in 1822 with additions to 1823. That is the map numbered 98; and I wanted to know if a copy of it was in the case. It is referred to on page 100 of the British Counter Case, Volume 1, map N° 98.

Sir Richard Webster. — If you would look at page 96, you will find Arrowsmith's Chart of the Pacific Ocean, originally published in 1798 with corrections to 1810. That I know we have; I should think it was the same map.

Mr Justice Harlan. — That was published in 1810.

Sir Richard Webster. — Originally published in 1798.

Mr Justice Harlan. — But I suppose, from the language of Sir Charles Bagot, the map he refers to is the one of 1822 with additions to 1823.

Sir Richard Webster. — Where does Sir Charles Bagot refer to it, Sir? On page 41, he refers to the one of 1802.

Mr Justice Harlan. — That is the Quartermasters-General's map that you furnished.

It is not laid down there (that is, the map published in 1802) in the Quartermaster-General's Department here, or laid down at all in that of Arrowsmith, which has been furnished to me from the Foreign Office.

I suppose that is the British Foreign Office?

Sir Richard Webster. — I should think so.

Mr Justice Harlan. — And the map in your list nearest to that date is one of 1822 with additions to 1823. It is N° 98.

Sir Richard Webster. — I should have doubted if that was it. It was a map of America. I should have thought it was more likely to be the map of the Pacific Ocean.

Mr Justice Harlan. — There are a large number of maps, — there is one of Arrowsmith in 1802; one in 1804, and one in 1809, and one in 1811, — reading from your list.

Sir Richard Webster. — You see this map was sent by the Foreign Office to Sir Charles Bagot at St Petersburgh. We have not been able to find it at the Foreign Office; and it by no means follows that it would have come back. We should only have such papers as he sent back.

Mr Justice Harlan. — Would it be in the British Museum?

Mr Tupper. — No, this was not. We were unable to identify it.

Mr Justice Harlan. — From what source was that memorandum obtained on page 100, N° 98? You give there a list of maps.

Sir Richard Webster. — That I have no doubt can be obtained.

Mr Justice Harlan. — That is the one I am enquiring about.

Sir Richard Webster. — But there is nothing to identify it with the map referred to in Sir Charles Bagot's letter.

Mr Justice Harlan. — No; but it is the one in your list nearest to the date of his letter; that is all. There is one there of 1818; and those maps together might be of some value.

Sir Richard Webster. — It seems to me, but it is entirely for you to say, there are many other Arrowsmith's maps that would quite as nearly correspond. The coincidence of the date is a very small matter indeed; because the one you referred to of 1798 has additions up to 1823. This letter was written in August, 1823; and it by no means follows that the publication was before this letter. I only submit it for your judgment. After all, it is very untrustworthy. It is corrected up to 1823, but that may be the end of 1823.

Mr Justice Harlan. — And it may be the map of 1818 of Asia by Arrowsmith.

Sir Richard Webster. — Or the large Chart of the Pacific Ocean, N° 40,

published in 1810. You know that when these corrections come home, they have to be plotted out and printed, and it by no means follows that corrections to 1823 would be published in that year; more probably, it would not be so.

Mr Justice Harlan. — You may be right about that.

Sir Richard Webster. — Anyhow, I am not able to give you further assistance.

The President. — If that map of 1822 was used, would it not be in your favour?

Sir Richard Webster. — I was not considering the effect of my answer one way or the other; I was endeavouring to give the Judge the information he wanted. I do not think my argument depends on any particular map; but I trust I made clear to the Tribunal yesterday that between the Contracting Parties there was no doubt about what they meant either by reference to " Pacific Ocean " or " North-west coast. "

When Mr Justice Harlan was good enough to put those questions to me, I was passing on to the 5th question in the Treaty, and I will indicate to the Tribunal the course I propose to adopt. I propose to examine Mr Carter's and Mr Phelps's argument with reference to the question of the right of property. I propose to examine Mr Phelps's argument as to the right of protection, for he has more pointedly dealt with that matter — though it is quite fair to Mr Carter to say that he has used arguments in his able speech incorporating the main features of Mr Phelps's argument; and therefore I do not consider that there is any distinction between Mr Carter and Mr Phelps in that respect. Then I should propose to say a word or two on a suggestion which fell from Senator Morgan, and which has arisen incidentally more than once in the course of this discussion as to what the function of this Tribunal is in answering Question 5.

There are minor differences between Mr Phelps and Mr Carter as to whether the United States have got the right to kill all the seals on the islands to which I am not going to refer further. I leave that very interesting subject of discussion for the next occasion when Mr Phelps or Mr Carter in the United States or in England, as I hope, meet on some platform where political economy and the abstract question as to the rights of property are being discussed : and I shall relegate to that occasion the question whether property is robbery, and whether the rights of the United States and of Great Britain to dispossess natives of their territory and to possess themselves of it, is the exercise of a legal right, or is a development of that principle which, years ago would have been called the force of arms. My learned friend Mr Carter has kindly taken under his wing and protection all the various acts, not altogether justifiable, which have been done by Great Britain and by the United States in the past and reduced them all to a philosophic basis. It seems to me, if I were to endeavour to follow him, I should soon get out of my depth, and I am certain that I should not assist this Tribunal. Therefore, I will confine myself to the legal aspect of these questions.

Sir, my learned friend Mr Carter, turned from the four questions, after a considerable discussion upon them, with a sense of relief, and he said, on page 364 of the report of his speech, —

> I approach with satisfaction a stage of this debate where I have an opportunity for the first time of putting the claims of the United States upon a basis which I feel to be impregnable. I mean the basis of a property interest. Now the United States asserted a property interest connected with these seals in two forms which, although they approach each other quite closely, and to a very considerable extent depend on the same evidence and the same consideration, are yet so far distinct and separate as to deserve a separate treatment.

And then he discussed the question of property in the seals and property in a seal " herd ".

Mr President, the traditions of my profession prevent me from being able to say that any answer which I can give to this proposition places Great Britain in an impregnable position, but I hope, as I said yesterday, that my arguments will not receive less attention or less consideration from this Tribunal if I abstain from endorsing them by personal opinions; I may in the heat of the moment be misled into using expressions which would look as though I was referring to my personal opinion, one cannot avoid doing so particularly in answer to questions put by the Tribunal, but I hope they will understand that I submit my argument to their judgment without craving any additional weight from the fact that I may be of opinion that my position is impregnable or the reverse. I mention that because otherwise those who may be good enough to read my argument way think that because I do not express personal opinions or personal belief in the merits of my case, therefore the case is entitled to less consideration, or my argument to less respect.

Now the proposition has been stated by my learned friend Mr Carter many times over and pretty much in the same language; and it is only necessary for me to give one citation for the purpose of reminding you of that to which I am about to address myself. He said (the particular reference is at page 464 of the report before you) : —

> Wherever an animal although commonly designated as wild, voluntarily subjects itself to human power to such an extent as to enable a particular man or a particular nation to deal with that animal so as to take its annual increase and, at the same time, to preserve the stock, it is the subject of property.

You will remember, Mr President, that in an argument extending over a very considerable time, my learned friend the Attorney General dealt with that argument — and I could not with advantage supplement what he said by any detailed examination of the main principles on which it is based. He pointed out that in the sense of subjection by the seals to the control of man, in the sense of the same voluntary subjection which takes place when the tame horse or tame or or tame pig or any other animal of that kind which may have been originally wild comes, and with dumb language, if I may use such an expression, asks to be fed or to be let into its stable — he pointed out that in that sense there was no subjection by

the seal to the control of man and he pointed out further that this doctrine that property depended upon a particular individual being able to take the annual increase must be ill-founded, for otherwise it would have given a claim to property in many cases, if not in every case, in which the law of all civilized countries has rejected it. I do not propose to follow my learned friend, the Attorney General, in detail into those arguments.

He further struck, I submit with effect and successfully, at that which my learned friends Mr Phelps and Mr Carter have assumed to be so clear, that no argument was desired to support it and any comprehension could retain it : namely that a property in the seal " herd ", as distinct from a property in each individual seal, was clear and intelligible, so that no demonstration or proof were necessary in support of such a contention. I may be permitted only in a single sentence to say that I have been — it may be the fault of my intelligence — unable to understand how, if there is no property in the individual seal, there can be a property in the aggregate of individual seals which forms the " herd ". Upon none of these points, though they occupy a very important portion of my learned friend Mr Carter's argument, and of the Attorney General's reply, do I feel it necessary to trouble this Tribunal with a lengthened argument. I have indicated sufficiently, my concurrence in the view which the Attorney General presented to the Tribunal. But I now come to that which in my submission is the vice which lies at the root of the argument written and oral, on behalf of the United States, a vice, I humbly submit, which, the moment it is recognised and appreciated, destroys to a large extent the value of the contention in respect of property. That vice is this, that the United States are unable, so far as their argument discloses it to us, to see any difference between the right which a man has to kill wild animals when they happen to come upon his land, and the right of property in the animal whether it is on the man's land or not. Over and over again in the course of the interesting argument of my learned friend Mr Coudert, relieved as it was, as you Mr President pointed out, by brightness in many points, he stated this proposition, and said it was so self-evident and so convincing by its mere enunciation that he would wait till the other side were heard; in fact, he treated it as an admission by us. I could refer to many passages; for instance at the very beginning of his speech — I refer to p[illegible] 554 — he said : —

> Now to start from a point that is certain, to reach one that may be certain, have we any rights of property at all as to the seals ? Here, fortunately, we all concede that we have, and it is said that upon the islands these are as much our property as though they were sheep or calves.
>
> **Sir Charles Russell.** — Certainly not.
>
> **Mr Coudert.** — Certainly not ?
>
> **Sir Charles Russell.** — Certainly not.
>
> **Mr Coudert.** — Well, I gave you credit, and I will take it back. I supposed that when we held the seal in our hand — I supposed when we slit its ear — I supposed that when we could put a brand upon it, that it was our own, as much as it was if it were a sheep or ewe. Where it comes in I am absolutely incompetent to

say. I have read the argument on the other side with interest, and I supposed that it was conceded that upon our land, in our hands, under our flag, in our waters, they were as absolutely our property, as *that* book is mine.

He was holding up the book from which he was conducting his argument. Sir, it is not saying too much to point out that this proposition, stated over and over again by Mr Coudert, stated also, though not so positively I admit, by Mr Carter; because Mr Carter did refer to the distinction between the right of killing *ratione soli*, and the right of property — I say that that proposition, stated over and over again by my learned friend Mr Coudert as being so plain as not to require argument, is radically unsound.

My learned friend, Mr Phelps, in his written argument at page 132 states it, I admit, not quite so distinctly as Mr Coudert, but still in all probability meaning to maintain the same proposition. This passage occurs — in his Argument having the same meaning, at page 132 : —

> The complete right of property in the Government, while the animals are upon the shore or within the cannon-shot range which marks the limit of territorial waters cannot be denied.

Of course, if my learned friend, Mr Phelps was then putting compendiously that which other writers have put, that the exclusive right of killing wild animals upon your own land gives you a qualified right of property *ratione soli*, meaning thereby an exclusive right to kill — if that is all Mr Phelps meant, there is no necessity to discuss it any more; but if the proposition is of any value at all it means this, that the wild animals, so long as they happen to be on the Pribilof Islands or in territorial waters are the property of the United States; and they cannot draw any distinction between the United States and the lessees, and therefore for this purpose they mean to allege that they are the property of the lessees, that they have the right of killing them, and they alone can exercise this right of killing, hunting, or shooting, or whatever it may be.

Senator Morgan. — As to the lessees, they cannot have a property in any of the seals except such as they kill.

Sir Richard Webster. — I contend that.

Senator Morgan. — The United States possess the right to all the seals, and that gives them the privilege of killing some.

Sir Richard Webster. — I must be permitted to reserve my statement, because I could not assent to that statement or allow it to pass as being supposed that I agree the United States have the right of property in these seals, because I contend most distinctly they have not.

Senator Morgan. — I meant to characterize it as the assertion of the other side. It is not even an expression of my own opinion.

Sir Richard Webster. — Yes, but as I read the legislation of the United States, it does not claim the property in these wild animals. I agree with an observation which fell from Lord Hannen. He was desi-

ring to keep us close to the point when he asked Sir Charles Russell, whether it would make any difference for the purpose of this discussion, if the United States Statute purported to give right of property in these seals. It would make no difference; and I will not argue any false point, but I must not be understood by my learned friend as conceding that in construing those Statutes of the United States as between the Government and the lessees, or as between the Government and a trespasser, they would have been able to lay the property (to use a technical expression) in the United States. In two sentences I will state my view. By the earliest legislation, the United States created the Islands a Government reserve, not unknown in other parts of America, not unknown in Canada : they reserved the Islands, and that enabled the United States to grant licenses and to prevent other people going to utilize those islands, or dealing with them in any way, except with the permission the Government of the United States. And as to wild animals, as the King, according to English law in years gone by, in certain royal forests and royal parks could restrain people from killing game, so the United States could restrain the citizens of the United States from killing or catching anything or even from working any minerals upon the Pribilof Islands, as they were a Government reserve.

But the lawyers who framed those Statutes had too much knowledge of law to endeavour to claim, even for the Government, property in seals If they have the property in seals they have the property in birds, they have the property in fish which live in the waters, they have the property in cod which come into the territorial waters. It is not a question of seals only; the United States by its legislation, written in the English language, as far as we can understand that legislation, does not even purport to claim the property in the wild animals.

Mr Justice Harlan. — What in your judgment could the United States have done by statute which would have been regarded by you as an assertion of right and property.

Sir Richard Webster. — They could have said that, as between themselves and their citizens, the property in all the game, and in all the seals if you like in the Pribilof Islands, should be vested in a public official or should be vested in the State. If they had said that, the result would be, if the seals were killed, proceedings might be taken by the United States for the value of the body, and a penalty might be inflicted.

Lord Hannen. — Some people have asked that the property in game should be given to the land owner.

Sir Richard Webster. — Yes, and I would point out according to our game laws, as they have now existed for centuries there is no ground for the suggestion that the property in game is in the Crown — whatever may have been the origin of the Game laws, there has not been for years any foundation for that suggestion.

But, Mr President, having made my respectful protest, let me say to

the members of the Tribunal, while I am supposed to concede that even as between a citizen of the United States and the Government of the United States the property of the seals may be in the Government, I equally admit that from the point in view that we are considering it is absolutely immaterial, because we are dealing with the right to capture and take these animals and the property in these animals when they are upon the high seas.

I go back to the point which I was considering when the question was put to me and I repeat that so far as I know, the law of no civilized nation has given the property in wild animals to the owner of the soil on the ground that those wild animals are temporarily upon the soil, being found here to-day and there to-morrow. I have examined with care the law of the United States. I have examined with care the law of Great Britain, and refreshed my memory upon it, in so far as I may may have forgotten points which I ought to know. I have examined as thoroughly and exhaustively as I could the French law; and I have placed at the disposal of my learned friend Mr Phelps the full text of the report upon the French law by a gentleman of great learning and eminence, Maître Clunet, obtained in case my own research in these matters should not be sufficient, I say — speaking subject to correction by the President, — that there is not the shadow of a pretence of saying that by the law of France the property in wild animals is given to the owner of the soil simply because they happen to be there; that in the French law as in the law of all other civilized countries that I know of, it is merely a right to kill, and the right to property in them never arises until possession is taken by killing. Sir, I must not speak with too great confidence of the laws of other countries; but of course it is only for the purpose of analogy that they are of service or of interest to this Tribunal. But perhaps I may be allowed to say that I am not aware of the law of any country, in which the law has been reduced either to a code or is in such an advanced condition that it can be summarized by text writers, or be referred to or appear in reported cases, that gives at the present time the property in wild animals simply by virtue of the possession of the soil on which they happen to be found. And I cannot help thinking that it was a little bold of my learned friend Mr Coudert to start with the suggestion that he gave us credit for the admission that we should concede that seals upon the Pribilof Islands, in the territorial waters of the Pribilof Islands, and under the flag of the United States, whatever that may mean — that on the territory and in those waters we should concede that they were the property of the United States just as much as the book which he held in his hand was his property.

Sir, there is no distinction for this purpose, for the purpose of the principles that we are applying, between nations and individuals. I ought perhaps to say that my learned friends Mr Carter and Mr Phelps, and I think Mr Coudert too, did not suggest that there was any distinction. They say actually in writing, at page 44 of the United States Argument,

that the principles of municipal law may be invoked for the purpose of considering this right of property, and Mr Carter said, that from the point of view in which he was considering this question of property, it was the same between nations as between individuals. It could scarcely be contradicted, because the Government of the United States must be taken to be an individual for this purpose. If the property were allowed in the Government, the nation would be itself an aggregation of individuals. So in the same way the various subjects of Great Britain would be able to claim property upon this principle as between one another. It is put very pointedly indeed at page 44 in the following passage.

> And the municipal jurisprudence of all nations proceeding upon the law of nature, is everywhere in substantial accord upon the question what things are the subject of property.

Therefore it is not in any way misrepresenting the position of my learned friend Mr Phelps if I indicate that they do not base their case upon any different principles, as applicable to nations, from those which they would apply in the case of individuals.

Now, Mr President, what is the law as between individuals? Is it the law that the presence on a piece of land of a wild animal gives the property to the owner of the land while it is there? Sir Charles Russell read from the United States authorities; and I am in this position, that unless my learned friend Mr Phelps was right in saying that one American Judge (I think he was Mr Justice Nelson) in one case where he was dealing with bees, thought that the presence of the bees in the tree — not *hived*, but in the tree — would give the owner of the tree the property in the bees : unless that Judge did in fact express that opinion, there is not a single authority for my learned friend's contention — not a single one. I suggested at the time to my learned friend the Attorney General, — and Mr Carter for the moment expressed accord with the view that we were suggesting — that the learned Judge did not mean to decide anything of the kind, and that that point was not before him; and when the whole of his judgment was examined, we submit it is plain that that learned Judge was laying down no different rule at all, but was simply referring to the doctrine of property *ratione soli*, i. e. the power to take that which was upon certain territory or land for the time being.

Therefore, Mr President, what is our position to-day in regard to this matter? The question is the same between Great Britain and the United States as it might be between two owners of the Pribilof Islands, as it might be between the owner of the island of St. Paul and the owner of the island of St. George. It is a pure accident, for the purpose of the matter we are considering, that both those islands happen to belong to the United States. They might have been on one side or the other of that imaginary line which is drawn through the sea in order to divide the territory of Russia from that of the United States; and so far as any knowledge in the minds of the United States negotiators at that time was concerned, there might

have been seal islands as close to each other as St. Paul and St. George on either side of the line, or those two islands themselves might have been on either side of that imaginary line. Let us, just for a moment, and only for a moment, test the case in that position. The St. Paul islander might say that the seals bred upon his island came back to his island, and that while they were on his island he could prevent anybody from killing them, he could prevent anybody from coming and hunting them; and the same would apply to the waters within which he was supposed to have exclusive dominion. I am in this position, Sir: — That so far as the main fallacy which I submit underlies the written and oral arguments of my learned friends is concerned, there is not an authority or a vestige of authority, (beyond that to which I have made passing reference and, which has been, I submit, misunderstood,) which has laid down a different proposition. There is not a vestige of authority with which I have to contend. On the contrary they are all in my favor. But my learned friends, knowing the extreme difficulty of their position, adduce in their aid a doctrine which is well recogniz d as giving what is called, not an absolute property, but a qualified property: and may I be permitted to say, Sir, a doctrine which, if mere presence upon the islands had been sufficient to give the absolute title, would have been wholly unnecessary; because I agree in the view presented by some members of the Tribunal that if there be absolute property in a thing, that property follows the thing where it goes, and does not depend upon geographical bounds at all. My learned friends being pressed by the difficulties of their position, invoke what is called *animus revertendi*.

The President. — Sir Richard, I beg to observe that, even admitting the statute law of the United States was to attribute property, as Lord Hannen justy observed, some people attribute to it, in the game or the fish or the birds, in any definite part of the territory of the United States, it would not be implied that other nations would acknowledge that property anywhere.

Sir Richard Webster. — That, of course, Mr President, is *a fortiori* an instance of what I was saying, and we must assume, and we must do gross injustice to the lawyers of the United States if we assume, that in disregard of this consideration they have framed their statutes as claiming property in these wild animals, not only while they are on land and in territorial waters, but when they are to be found in any part of the high sea. I do not wish to go back upon that, because I do not think it is fair or just to impute such a meaning to the framers of those statutes when it is not to be gathered from the statutes themselves. But, Sir, it is sufficient for my purpose to point out with reference to the observation you have made that when we refer to the principles upon which the law of property in the United States, Great Britain, and other civilized nations is based, we do not find any authority for the suggestion that the presence of the animal upon the land or within territorial waters gives anything more than a greater right and opportunity of killing, because you can

keep other people from coming there. It does not increase your property in the animal one iota. It is equally so whether the animal has an *animus revertendi* or whether it has not. If you can catch it there, you can take possession of it, and when you have taken possession of it, it is your property, and not till then, and only as long as you can keep it in your possession and no longer.

Now, Sir, when you were good enough to indicate that you were following what I ventured to put before you, by making that observation, I was pointing out that, feeling their position, they claimed to have this property by what they are pleased to call an application of the doctrine of *animus revertendi*.

Senator Morgan.— Do you contend that the United States Government, Sir Richard, have not forbidden its citizens to acquire the private ownership of fur-seals on the islands?

Sir Richard Webster. — I think the United States has permitted its citizens to acquire private ownership with their licence.

Senator Morgan.— The lessees you mean?

Sir Richard Webster. — The lessees; yes, Sir.

Senator Morgan. — I am speaking of private citizens that are not lessees.

Sir Richard Webster. — Only because they have not got the right to go there. That is all.

Senator Morgan. — I am speaking of private citizens who have the right to go there?

Sir Richard Webster. — Certainly. Only because the Government had said that: "None of our citizens shall kill seals on the Pribilof Islands except with our leave."

They have not altered the law of property at all. The lessee has no property in those seals until he has killed them. Mr Senator, I address you as a lawyer upon this matter, and I ask you to consider my argument simply and solely in that position; and I submit to you that the lessee has no property in any one of those seals until he has killed it, and that the law of the United States has not given that lessee any property in the seal until it is killed.

Senator Morgan. — I should suppose he would have property in the seal from the time he commenced driving it to the shambles to be killed.

Sir Richard Webster.— I beg your pardon. He has no property until he has succeeding in capturing it. I admit that he would have evinced the intention of taking possession of it, just in the same way as when I point my gun at a wild pheasant or a wild duck I evince my intention of shooting it if I can, and of taking possession of it and making it my own; but I may miss with the gun, and the man may not succeed in driving the seal to the place where he can knock it upon the head. It is not the intention to drive that seal that gives property.

Senator Morgan. — What becomes, then, of the part of the statutes that prohibits hunting by citizens of the United States.

Sir Richard Webster. — That has the effect of saying that nobody else may go there and try to take possession.

Senator Morgan. — I mean outside the three mile limit, anywhere in Behring Sea?

Sir Richard Webster. — That is simply and solely that the United States has said that in the interest of its revenue it will prevent its citizens from killing seals — I mean assuming that to be the construction; of course I do not want to argue again that was not the original construction — but assume that there was a statute that no person should kill any seal in Behring Sea east of that line in distinct terms, in so many words : the result of that would be not that the United States would claim any property, not that the United States statute would give any property, but that in the interest of itself, of its lessess, of any person who desired ultimately to kill seals on the islands and reduce them into possession, the United States thought fit to make that game law.

Senator Morgan. — But would it not be entirely clear that the person who should kill seals in Behring Sea outside the three mile limit, he being a citizen of the United States, could not acquire any property in that animal?

Sir Richard Webster. — It would not be so at all, Senator. That would be entirely dependent upon whether or not by the United States law the property in game killed by a person unlawfully did or did not remain in him — a perfectly academic question, from the point of view we are considering. I really do not know, I never have inquired, whether by the United States law — if a man goes on to the land of a third person and unlawfully kills game, when that game is killed it belongs to the owner of the land upon which it falls or whether it belongs to the trespasser; but from the point of view which Iam considering, it makes no difference, because no property is acquired by anybody until the thing is shot.

Mr Justice Harlan. — Game killed under those circumstances belongs to the owner of the land, I think, by our law.

Sir Richard Webster. — That is the law of England, but I did not know whether any statute of the United States altered the law on that subject.

Mr Justice Harlan. — There is no statute on that subject.

Sir Richard Webster. — I am much obliged, Sir. My answer to the Senator, and the answer upon which I am prepared to stand, is that there would be no property in anybody at all until that game was shot.

Senator Morgan. — And that nobody in the United States had any property in them?

Sir Richard Webster. — No; not in these seals.

Senator Morgan. — Then how could anybody acquire property under such circumstances *ratione soli?*

Sir Richard Webster. — It depends upon what you mean by *ratione soli*. *Ratione soli* is the privilege to kill. I will put the case to you, Sir.

There was nothing to prevent the United States Government from saying : We will by law prohibit every one of our citizens from killing seals unless they take a license from the Government.

There is nothing to prevent it. That practice exists in England to-day. I cannot kill a partridge or I cannot kill certain wild birds on my own land even without the license of my Government. I presume — I do not really know — that the game laws of the United States are similar. I do not care for the purposes of my argument whether they are or not; but nobody has ever pretended that that license to kill gives a property in the game.

Senator Morgan. — But it would prevent the property from being vested in you if you shot the game contrary to law.

Sir Richard Webster. — I really do not know that; and for my purpose it is perfectly immaterial, because I do not care whether, when the animal is killed, it belongs to the United States, or belongs to a public officer, or belongs to me. My point, respectfully, Sir, is that until it is killed there is no property in anybody at all. It is absolutely immaterial to my argument whether when the animal is killed and taken possession of the property in the body is in the person who has killed it or in the person upon whose land it falls, or, if you like, in the Government. The whole point we are discussing to-day is, — Is there any property in the live animal before possession has been taken of it; and I do not perceive that any light is thrown upon that point by considering what technical rule applies as to the property in the animal when killed.

Senator Morgan. — Then, as I understand you, the only way of acquiring property in the fur-seal is to kill it?

Sir Richard Webster. — Unquestionably the only way of acquiring property in the fur-seal is to kill it.

Senator Morgan. — That is what I meant.

Sir Richard Webster. — I am not referring, Sir, if you please, to property in the islands that enables you to exclude other people.

The President. — You can take possession of a living fur-seal, I suppose.

Sir Richard Webster. — Of course. I ought I suppose to have included that; but from the question of Senator Morgan I did not think he meant that.

Senator Morgan. — I did not mean that.

Sir Richard Webster. — Let me give the answer. Of course if you have a pond staked out on the shores of the Pribilof Islands and you drive the seals into that water and keep them there and feed them every day, as you would animals in a zoological garden, then they become *coarctatus*. They become restrained, and so long as you keep them there you can take them out and shoot them and catch them. You have reduced those seals into possession. You can possess a living seal as well as a dead one. But I was dealing with the case of a seal which was found at large, swim-

ming, and I was answering the Senator with reference to the point he was putting to me, that of a free swimming seal in the high seas. Nobody can, according to the law as it stands to-day, obtain the property in that seal except by taking possession of the animal. That is my contention, and if I have not answered your question sufficiently to explain my meaning, I know you will indicate it to me.

Senator Morgan. — That answers the question entirely, I think. You say there is no way of taking possession of the seal except by killing it.

Sir Richard Webster. — It is always important, Mr President, to be careful that a statement of that kind is exhaustive, and therefore I thank you for putting the question to me. I was excluding zoological gardens from my mind for he moment. Of course I admit that if you retain animals in the sense of keeping them inclosed in a pen, that is another method of obtaining possession of them and keeping them alive.

The President. — Yes; and not only one but several of them in a herd, I suppose?

Sir Richard Webster. — Oh certainly; there is not the slightest difference.

The Tribunal thereupon adjourned for a short time.

The President. — Sir Richard, we are ready to hear you.

Sir Richard Webster. — Mr President, by an accident, and a very fortunate accident, I am able to answer, before I resume my argument Senator Morgan's question. Mr Piggott (who was legal adviser to the Japanese Cabinet), happens to be here, and he happens to be able to give me, from his own knowledge, the references to the document that we happen to have in Hertslet, here, with reference to the action that Senator Morgan called attention to, in the year 1855. I am referring to Hertslet, Vol. X p. 468. The actual convention is not set out — it is in an earlier volume — but in the year 1855 a convention was made between Great Britain and the Emperor of Japan which gave Great Britain the right to navigate a certain internal or inland sea — the one referred to by Senator Morgan, which I believe was, at one place, only a mile and three quarters or two miles wide — or something of that sort.

Senator Morgan. — It is not a Sea — it is the Straits of Shimonoseki.

Sir Richard Webster. — I merely used the expression " inland sea ", because it will be found to be used in the original convention; but it makes no difference.

Lord Hannen. — It is a passage from one large ocean to another.

Sir Richard Webster. — Yes. The Japanese name is " Inland Sea ".

The President. — Was that confined, to England, or did it include France and the United States?

Sir Richard Webster. — I think, if I remember rightly, the United States subsequently joined in it.

Senator Morgan. — You mean in the Treaty?

Sir Richard Webster. — There are fourteen powers.

Senator Morgan. — We had no part in the Treaty.

Sir Richard Webster. — I will not say in the Treaty — I think it will turn out that the United States got (either by Treaty or by some other arrangement), the benefit of it; but for the purpose that I am dealing with it at the present moment, it makes no difference.

The President. — In 1865 was it?

Sir Richard Webster. — 1855.

The President. — That was the date of the Crimean war, and very likely concerned the English and French fleets.

Sir Richard Webster. — Mr Piggott tells me there were fifteen or sixteen Powers that had the same rights, and I thought that probably the United States were among them.

The President. — The same rights by Convention, of course?

Sir Richard Webster. — Do not let that be taken from me, if the Senator says the United States had not.

Senator Morgan. — I do not think they had — not to my recollection.

Sir Richard Webster. — If the Senator says they had not, I will look it up; but from the point of view he was putting to me, it makes no difference.

Senator Morgan. — Not at all.

Sir Richard Webster. — Certain Powers, among others Great Britain, had got these rights by Treaty. In 1864 a Prince of the name of Choshiu — (I am referring now to the 12th volume of Hertslet p. 1145) — appears to have rebelled against the then Government of Japan and objected to this right of passage being exercised by foreigners, and, I believe, actually interfered with British ships in the course of their navigation, whereupon Great Britain, in conjunction with the United States, and with some other Powers, made an arrangement for coercive measures which they should take to restrain the rebellious action of Choshiu which the Government of Japan was not able to restrain; and the action referred to by the learned Senator this morning, was the action taken by Great Britain to enforce their Treaty rights which existed by the convention of 1855. If the learned Senator tells me that the United States had not got similar Treaty rights, of course the argument would not apply; but I rather think it will be found, when the history is looked up, that they also had Treaty right.

Senator Morgan. — We only had the privileges, I think, of the most favored nations.

Sir Richard Webster. — That would answer it at once. One knows

what the expression "favored nation", means, — that would give them, at once the same rights. But at this page 1145 the history of it is referred to. It will be found that the action was taken in 1864, pursuant to a Memorandum which I will read.

Memorandum delivered by the representatives of Great Britain, France, the United States, and the Netherlands, in Japan relative to the coercive measures to be adopted against the Prince of Chioshiu in the Straits of Shimonoseki, and elsewhere.

So that the state of things was this — not that Great Britain was in any way assuming to take any action against what I may call the *de facto* and proper Government of Japan, but that they found that their Treaty rights were being infringed by the action of a prince who was practically rebelling against the Government of Japan, and, thereupon they said to the Government of Japan: If you cannot put down this rebellious chief, we will help you to do it.

And the recitals which I have in the memorandum before me are distinct. The first paragraph is this:

When the Treaty Powers in 1862 consented, on the representations of the Tycoon's Envoys, to certain important modifications in the treaties; the spirit, the motives and the extent of these concessions were clearly set forth.

In consenting to the deferred opening of the ports, mentioned in the memorandum signed at the time, the Treaty Powers were careful to establish the fact that this postponement, far from signifying a virtual abandonment of their rights, was, on the contrary, to be taken as indicating their firm resolution to maintain them, by furnishing the Tycoon with the means which he declared to be necessary for securing them in a more effectual manner.

In a word, the Japanese Government by the very tenor of those representations, pledged itself to remove, in exchange for these temporary concessions, all the difficulties of the time, and the obstacles which might oppose the development of our relations.

But what have been the results of these promises and concessions?

The undersigned summed them up, when, last year in the month of July, they addressed to the Tycoon an identical note describing the restrictions placed upon commerce, the murderous assaults committed upon foreigners, the closing of the Island Sea, and the attacks made upon foreign vessels by a Daimio:

That was the Prince of Choshiu, who was one of the Daimios, who had been attacking foreign vessels. The memorandum then proceeds.

The Tycoon, by treating with foreigners on a footing of equality, has hurt the national pride of the Daimios, while he has damaged their interests by reserving to himself the monopoly of the new commercial relations.

It then sets out the statement that a certain number of these Daimios had rebelled against the authority of the Government of Japan, taking, as the cause of their complaint, these Treaty arrangements which had been made by the Government with the various Powers which were thought to

be inconsistent with the national dignity. I now read from page 1147 :

The political situation of Japan might therefore be summed up as follows : —

Weakness of the Tycoon and increasing powerlessness of that Prince to resist the violent pressure of a hostile majority.

Existence of a party favorable to continued relations with foreigners, but at this moment incapable of giving effect to its opinions.

Finally, armaments of every kind, prepared with the loudly avowed intention of expelling all foreigners from the country.

The position made for the Representative of Foreign Powers is the natural consequence of the situation and the tendencies which they have just pointed out.

The residence in the capital is virtually interdicted.

The passage through the Island Sea is forbidden to their vessels, by means of batteries erected with that object.

Then there is a further reference to other restrictions under which foreigners were placed, and the memorandum proceeds in this way :

The recent decision of the Governments to which the demands on the part of the Japanese Mission now in Europe has given rise, enable the undersigned clearly to define their obligations. The foreign Powers not only reject in categorical terms the propositions regarding the abandonment of Yokohama, but also refuse, by anticipation, to listen to any overture for the modification of existing Treaties or curtailment of the rights they confer.

The instructions transmitted to the undersigned are identical. All are directed to maintain Treaty rights intact, and to insist on their complete observance.

Then follows a reference of how the Treaty rights had been exercised, most fairly, in the interests of the residents as well as of the foreigners; and then the memorandum sayss :

Whereas a more energetic attitude would, on the contrary, have undoubtedly, for immediate result, the dissipation of the idea now entertained by the daimios, that patience has only been dictated by weakness or fear.

A vigorous demonstration will disarrange schemes scarcely yet formed, and it is calculated to give support to the party favorable to the maintenance of Treaties before its opponents will have time to crush it. It will moreover give a salutary lesson to those semi-independent feudal chiefs who scoff at the obligations of Treaties, the validity of which they repudiate, and who for the justification of their continuous acts of violence appeal to a decree still in existence which makes foreigners outlaws.

In a word, this decided attitude may furnish to the Tycoon an occasion to regain an influence which is slipping from his weak hands, although he is far from willing to abdicate or renounce his governing powers. At all events it may compel this Prince [that was Choshiu] to abandon the system of duplicity and half-measures which he now follows, and openly declare whether he wishes to respect the Treaties, or sides with those who wish to tear them up.

Then the memorandum further states the unanimous agreement of the undersigned to the course that is going to be suggested, and then it proceeds :

How and where the first blow must be struck is easily determined by an examination of the present state of things.

While the majority of the party hostile to the Treaties has limited itself to menaces, the Prince of Choshiu has resolutely taken the initiative of attack, by prohibiting to foreign vessels all access to the Inland Sea, and by stopping the sup-

plies of produce for the Nagasaki market carried on by native junks as has been shown by the successive reports received from the Consular Agents at that port; such a continued violation of the Law of Nations and formal negation of Treaty rights has been encouraged by the impunity which those perpetrating the acts have been allowed to enjoy.

The President. — I believe the point is very clearly made out.

Sir Richard Webster. — That memorandum was signed by all the Powers I have mentioned — the United States among them — relying and insisting upon their rights under that Treaty.

Senator Morgan. — With deference, I do not believe that the point has been clearly made out, and I beg to state the reasons, in deference to the judgment of the learned President.

The President. — I mean with reference to what Sir Richard told us.

Senator Morgan. — My reason for saying that is this : The Tycoon of Japan was a military officer who undertook to put himself at the head of the Government, and retire the Mikado on his ecclesiastical authority simply.

Sir Richard Webster. — That was Choshiu?

Senator Morgan. — No, the Mikado — on his ecclesiastical authority simply, and to cut him out from any participation in the civil Government. The Tycoon while thus established, was denied by the Japanese the powers of the Government to make that Treaty with Great Britain I have never been informed that the United States was a party to it or the Netherlands, or France. That matter went on until a strife, a revolution, occurred in Japan, by which the feudal chiefs (of whom the Prince of Choshiu was one, Prince Negato) undertook to affirm and re-establish the authority of the Mikado. The British Government undertook to sustain the Tycoon and claimed the authority of the Treaty it had made with the Tycoon, and in doing so it of course continued to send its ships through these narrow straits of Shimonoseki. The Netherlands did the same and the United States did the same. When the United States ship was attacked, Admiral Macdougal went down with the " Wyoming ", attacked the batteries of Prince of Choshiu, and beat them; also three ships of war that were stationed in this very narrow pass. The Tycoon was overthrown; the Mikado was reinstated in his power, and no new treaty arrangement has been made which gives to any of these countries a higher power than they had before. So that I beg leave to say, I suppose that that was an assertion on the part of Great Britain France, the Netherlands and the United States, that that was a part of the high seas — a part o the open sea — through which the ships of all countries had the right to pass, and that was at the bottom of their contention.

Sir Richard Webster. — I only say, Senator, with great respect, that from your own recital of it I should have thought that the contrary conclusion must have been drawn. That the rights were originally given by Treaty, as far as Great Britain was concerned, there is no doubt; and the fact that there has been no fresh Treaty since then, seems to

me to point to the irresistible inference that on the rebellion of Choshiu against the lawful authority being put down, the old Treaty rights revived, and that we have continued to navigate the island waters under the Treaty.

Senator Morgan. — There was just the contrary contention by the United States, and upon that we paid back the indemnity money to Japan that she had paid us on that occasion.

Sir Richard Webster. — I am only dealing with the information I have before me; but certainly, so far as I have been able to obtain information from the original documents at my disposal during the interval of the adjournment, they appear at present to support the view of this transaction that I have ventured to put before you. Of course if there be other official documents which show I am wrong, I shall at once admit it; but I cannot admit it in the face of the documents which are the only ones to which I have access up to the present time.

The President. — Mr Senator, your opinion would be that the United States did not acknowledge the liberty of passing through these straits?

Senator Morgan. — It demanded the liberty of passing through.

Sir Richard Webster. — I cannot help thinking it will turn out that they claimed it under the " favored nation " clause, which was the idea that passed through Senator Morgan's mind — I cannot help thinking it will turn out that there was a favored nation agreement between Japan and the United States under which the United States claimed the same privileges which Great Britain had.

Senator Morgan. — If so, there must have been, at the same time, some other justification.

Sir Richard Webster. — Following the actual documents, I cannot but assume that when Great Powers put forward Treaties, that real *bona fide* straightforward action was taken by the Great Powers.

The President. — At any rate, one fact is clear — that the Straits are less than three miles wide.

Senator Morgan. — They are about a mile and a half wide.

The President. — Then it would seem they were territorial waters unless Japan was brought to surrender what they considered as inland waters.

Sir Richard Webster. — The first right, as far as Great Britain is concerned, was by Treaty.

Senator Morgan. — They had been open to the nations of the world — for a great many years prior to the action on the part of Great Britain in making the Treaty.

Sir Richard Webster. — The original right of Great Britain to go through was by Treaty.

Lord Hannen. — Great Britain preferred to take it by Treaty rather than to assert it as an international right.

Sir Richard Webster. — It does not seem to me that it is very close to the point I was arguing; but, of course, the Senator was good enough

to say that he desired it examined by the Counsel of both parties; and I believe (I speak with authority on this matter as my learned friend Mr Piggott is present), I have given an accurate account of the transaction as far as Great Britain is concerned unless documents are produced to show that I am wrong in that matter.

You will remember, Sir, at the adjournment of the Tribunal, I had pressed most strongly that, in the case of all wild animals, in order to acquire property, possession must be taken; and, in reply to the questions put by the Senator before the adjournment, my contention is that no property at all could be acquired in a seal inside or outside territorial waters till possession had been taken, and the only way in which property could be acquired is by taking possession; and, with reference to the point he put to me as to what would happen if a United States' subject killed a seal in the waters of Behring Sea, I would reply to him that prior to the year 1889, when President Harrison came into Office and the law was extended over the waters of Behring Sea up to the easterr line, there was no prohibition against the killing of male seals at all outside what may be called the territorial waters of Alaska. That is, to say, outside the proper limit of territorial waters, there was no prohibition against a United States' subject shooting a male seal, and he would have acquired the right of property in that male seal by shooting it, or killing it, or by capturing it, and by no other operation.

Now, I desire to supplement what I said in regard to this matter by referring to two authorities only bearing on the question you were good enough to put to me with reference to keeping the animals alive in a pen or in an enclosure. It is a question entirely of whether the enclosure in which they are held is such that you can, at any time, take possession of them and capture them. That is referred to at page 31 of the British Argument; and three authorities are given, one taken from a book, which I think Mr Justice Harlan has been recently looking through. Pollock and Wright's book on "Possession in the Common Law", and I read from page 31 of our Argument :

> Trespass or theft cannot at common law be committed of living animals *feræ naturæ* unless they are tame or confined. They may be in the park or pond of a person who has the exclusive right to take them, but they are not in his possession unless they are either so confined, or so powerless by reason of immaturity that they can be taken at pleasure with certainty.

And then two instances of that are given, both of which are authorities in our Courts, — *Young* v. *Hitchens*, where fish only partly in a seine-net were held not to be in possession; that is to say, they were not sufficiently captured : and *Regina* v. *Revu Pothadu*, where fish in irrigation tanks in India (that is to say, large tanks not like ordinary ponds or stews, where fish are kept when in possession) were held not to be in possession.

Mr Justice Harlan.. — I should like to say that you must read the

sentence succeeding the one you read, in order to get at the full meaning of it the author.

Sir Richard Webster. — The succeeding sentence, as the learned Judge asks me to read it, is this :

> An animal, once tamed or reclaimed, may continue in a man's possession, although it fly or run abroad at its will, if it is in the habit of returning regularly to a place where it is under his complete control; such habit is commonly called "*animus revertendi*".

The learned Judge must pardon me for pointing out, with great deference, this does not bear on the question of *what is sufficient possession*. I am not on the question of *animus revertendi* now, or, I am sure unintentionally, he would not have diverted the mind of the Court from the question of what is sufficient possession. I am not on the question of how that possession is continued, but what is sufficient possession; and the test of suffiency is that they can be taken at pleasure with certainty; and, in the same way, I shall show you that animals which, in the proper sense of the word, have the *animus revertendi* can be so taken without exception.

> It is to be noted that the taking of an animal *feræ naturæ* found at large, though in fact having an *animus revertendi*, will not be theft if the taker had not the means of knowing that it was reclaimed; not because there is no trespass, but because an essential ingredient of *animus furandi* is excluded by his ignorance that there was an owner. In some cases, also, theft is excluded by reason that the taking is constituted a lesser offence by Statute.

Mr Justice Harlan. — I only referred to it because it was used there in the argument to demonstrate the right to take them, and the right of possession was gone when they left the enclosure. I only meant to suggest that that sentence, taken in connection with the one you read, would perhaps give the whole mind of the Author.

Sir Richard Webster. — If that impression is conveyed by that passage in the argument, it is not what the persons who framed the argument meant. What the persons who framed the argument meant was what is the question of what is sufficient possession, and that that can be retained by *animus revertendi*, not only do we not dispute, but in the subsequent passage that is pointed out. I do not think with great deference a lawyer would have stated it differently, though doubtless he would have been careful to point out, that possession is preserved by what the law calls *animus revertendi* because you have to differentiate the case of animals of which possession has been taken.

The President. — Do you understand the last phrase you read from Pollock and Wright as meaning, that when there is no *animus furandi*, when one takes this reclaimed game out of premises where it is generally kept, he would legally get possession of it?

Sir Richard Webster. — I think that is not the sentence to which the learned Judge referred. The distinction would affect the question if its being a crime, but would not touch the question of property.

The President. — You do not think the other alludes to the question of property.

Sir Richard Webster. — I think the question of property ended at the words " Such habit is called an *animus revertendi* ".

Those are the two sentences to which Mr Justice Harlan called my attention to. I only read further in case I should have omitted anything.

The President. — Still, it was interesting.

Lord Hannen. — The Authors go on to point out that even if the animal has been tamed and reclaimed, yet, if it is at large so that the taker has no means of knowing it was private property, it negatives the idea of his having the *animus furandi*.

The President. — Yes; but what as to the question of property?

Lord Hannen. — It does not touch the question of property in the man who has reclaimed, but only deals with the guilt of the person who took it.

The President. — You would consider the man who reclaimed remains legal owner.

Sir Richard Webster. — As my Lord Hannen put, if the animal was his on the ground of having been tamed and reclaimed, and it was going to return to his dominion or place, it would still remain his.

The President. — So that the man that intercepted it would not be punished for theft, but it would not alter the property.

Sir Richard Webster. — Yes. Take the case of a tame stray horse; I doubt very much if a man could be punished for theft if he simply caught the horse, and did not know whose it was, and kept it. He would have no defence to an action for not bringing it back; but he could not be charged with theft, because he would say : — It was a stray horse, and I took it because no one was there with it.

I will not overlook this question of *animus revertendi*, and I assure Mr Justice Harlan that I had not the slightest idea of suggesting that property might not be continued by means of *animus revertendi* but it was the second branch of that which I was about to address myself to.

Mr Justice Harlan. — You must excuse me, I did so, because in printed Argument of Great Britain it is introduced in the discussion of the question of property.

Sir Richard Webster. — I think quite rightly, but you must look at the argument as a whole.

Mr Justice Harlan. — I understand and I only meant that that sentence should be taken with the one quoted in the brief to get the full mind of the author.

Sir Richard Webster. — Yes, I think the answer is to consider whether the person who framed it was considering the whole subject or part of it and I understand they were only dealing with possession as distinguished from how that possession would be continued.

Sir, I cannot state this question of what is sufficient possession better

than in the language of Savigny which is cited in the United States Argument page 108 :

> Wild animals are only possessed so long as some special disposition (custodia) exists which enables us actually to get them into our power. It is not every custodia, therefore which is sufficient ; whoever, for instance, keeps wild animals in a park, or fish in a lake, has undoubtedly done something to secure them, but it does not depend upon his mere will, but on a variety of accidents whether he can actually catch them when he wishes, consequently, possession is not here retained; quite otherwise with fish kept in a stew, or animals in a yard, because then they may be caught at any moment. Third ly, wild beasts tamed artificially are likened to domesticated animals so long as they retain the habit of returning to the spot where their possessor keeps them (*donec animum, i. e. consuetudinem, revertendi habet*).

Now I resume the thread which I dropped just before the adjournment. Pressed with the difficulty of contending successfully that the presence of the wild animals on land or in territorial waters was sufficient, the advisers of the United States have endeavoured to supplement their case by saying that the property that the United States or the owners of lands have depends on *animus revertendi*. In that they are guilty of two fallacies. One I have endeavoured to expose ; the other I am about to expose. The two fallacies are, first, that the suggestion that mere presence of the wild animals upon the islands gives property at all in the animal : and, second, that that property whatever it was is retained by what they are pleased to call *animus revertendi*.

I address myself as closely as I can to the second branch of the argument. I must put my proposition somewhat boldly, but I am open to refutation and answer if I make a mistake therein — I assert there is no instance in the books where the doctrine of *animus revertendi* has been applied, where possession had not been already previously taken. I say the doctrine of *animus revertendi* only applies where possession has been taken, so that, in fact, the person has had at some time or other the power of taking and actually capturing and possessing the animals. I care not which animal be chosen, I will take only one of the four or five instances there are in the books to which attention may be called ; but I should like to take two, one of which certainly appeared very, very often in the argument of my learned friend, Mr Carter, because I could not help thinking that like the bee that returns to the flower from time to time to get honey from it, whenever my learned friend, Mr Carter, was a little exhausted, be returned to the bees themselves as his stock instance; and I do not think I shall be wrong in saying that those highly-favoured bees appeared half-a-dozen times in my learned friend, Mr Carter's argument, not too often for my purpose, because they are a very effective illustration of what I mean ; I will take the case of the bees. There is never any property in the bees whatever till they have been hived. Every authority agrees on that — Roman, English, American, French. There is no property in the bees whatever till they have been hived. What does hiving mean? Hiving means that in a house prepared for the reception of the bees, moveable if it is considered desirable they should be moved — a skip either

made of straw or a structure of wood capable of being closed, so that the bees can be carried away when in the hive, if you desire to take them to another place in that hive; when they have been so hived and by their habits continue to return home to that hive, then so long and so long only is there a property in the swarm or the herd, if my learned friend likes it, or the hive of bees. Take pigeons in a dovecot. The dovecot is provided and is repeatedly closed at night, but whether closed at night or not, it could be if necessary. In both cases there is food supplied where it is desirable that the animal should have food.

The President. — You do not speak of a tame dove now.

Sir Richard Webster. — I speak of a dove or pigeon in respect of which this *animus revertendi* is supposed to continue the possession — pigeons in a dovecot or pigeon-house. It depends on what you call tame, because there is no case in the books of the wild pigeon that nests in your trees or the rocks, which come back every day or every night, having fed in the fields of the adjoining farmers, being your property. On the contrary, it is specifically put with respect to the pigeons that are housed in the dovecote.

Lord Hannen. — Homed.

Sir Richard Webster. — Yes, their home is in the dovecote or pigeon-house. Whether they are tame birds in the sense of feeding out of your hand is a question of degree.

The President. — You mean pigeons not fed by the hand of man.

Sir Richard Webster. — Well there are and there are not — as a matter of fact speaking of these pigeons if they cannot get food in very hard times in the fields they would be fed in the dove-cot, and indeed the way they are induced to come to the dove-cot in the first instance is that food is scattered and they are attracted to it by the art of man. But my point is, and I challenge my learned friend to contradict it, that there is no case of the doctrine of *animus revertendi* being applied, except where the animal has previous to its departure been in some place in which possession has been or could be in fact taken. I have all the authorities under my hand and you will remember them — the geese that fed out of the man's hand and were driven away by the Defendant's dog which had twice been brought back and said to be so tame they fed out of the man's hand : the bees in their hive : the pigeons, as I have already said, in their dove-cot or house : the deer which have been made so tame that they will go into an enclosure or stable where they could be kept if it was desired to keep them, and have been so accustomed to it by the hand of man that they come back intending, as Savigny puts it, and I cannot put it better than it is put in page 108. " To return to the spot where their possessor keeps them. "

Now what is the case made to day? The case made to-day is that migratory instinct is equivalent to *animus revertendi*, that is to say the fact that the animal, the seal, in the spring of the year, comes to the land — either the male from sexual instincts, or the female to be delivered

of its young — that it is the habit of coming to and fro to the land for a limited portion of the year and then returning to the sea — it is said that that migratory instinct in equivalent to an *animus revertendi*.

Now I appeal, Mr President, to you and to every member of this Tribunal, as a lawyer, and I appeal to their impartial judgment that they can not only find no authority, but not even a vestige of an authority for the suggestion that migratory instincts are sufficient to give a property in animals on the ground that that is an *animus revertendi*. Sir, if that be the case there are literally speaking in England (I do not know enough about the United States to speak of them) hundreds of kinds birds that in their migration come back to the same identical spot — to the same tree and year after year make their nests in the same place or repair the old nests and occupy the same place, and those birds may go away at other times of the year from equally natural instincts either climate or from some other cause — because the food does not suit them — and yet not only is there no trace of such a doctrine, but whenever the matter has come up it has been pointed out that migratory instincts are not sufficient. Every authority that my learned friend has cited supports my contention. I remember one — though I could go through all, but they were exhaustively examined by the Attorney General — *Hammond* v. *Mockett* where the crows, or rooks as they ought to be called, built regularly in a man's trees, came regularly there and were in the habit of frequenting those trees in his property. It was held on the same principle we have been discussing, though there was not only the strongest *animus revertendi* but an indisputable *animus revertendi*, that there was no property in them.

Mr Justice Harlan. — Was not that mainly on the ground that the Court said it was an animal that was not useful but a nuisance?

Sir Richard Webster. — No, certainly not. I say the whole of the earlier part of the judgment proceeds entirely upon the question of property. There being no property in the animal at all as being an animal *feræ naturæ*, they do, in the other part of their judgment, refer to the fact that rooks are not *usually* of an article of food. If you will be good enough to look at the full report of that case, you will find some five or six out of the eight pages of the Judgment proceed entirely on the ground I have been mentioning to you, that there is no property in a wild animal simply because it returns and lives in my trees or my ground; and not being an article of food comes in entirely at the end of the Judgment, and is not made the subject of the Judgment.

Senator Morgan. — It might not do to assume, accepting your distinction to be correct between migratory instincts and *animus revertendi*, that the seals that occupy Behring Sea periodically are drawn to those Islands by simply migratory instincts. For instance, a nursing-mother, that goes out to find food in order to nourish herself to be able to feed her young could not be said to return under a migratory instinct, but an *animus revertendi*.

Sir Richard Webster. — I was not attempting to deal with any specific difference which may be drawn between particular seals or classes of seals.

Senator Morgan. — But the principle, unless it applies clearly all through, does not apply at all.

Sir Richard Webster. — If you say so and give judgment, then I must bow.

Senator Morgan. — No, I do not say so, and I do not give judgment; I make a suggestion for you to argue.

Sir Richard Webster. — I can scarcely conceive, Senator, if persons were in a position to establish ownership in any particular animal, that that would carry with it those animals to which none of those principles applied.

Senator Morgan. — It might not.

Sir Richard Webster. — But your assumption was that, if the principle applied, it applied all through.

Senator Morgan. — No; I make no assumption, I simply put a question. If it is applied at all, should it not be applied throughout? And I think that is a fair question for you to answer.

Sir Richard Webster. — I agree; and I do not shrink from it; you have to see what the principle is; and it is this, not that the animal is property during a given month, or during a certain number of weeks, but always property, and this property for which my learned friend contented is property in the seals when they are thousands of miles away at all times of the year. It has been put by Mr Carter and Mr Coudert orally, and in writing by Mr Phelps, that that property follows the animal wherever it is; and it might be impossible to justify a claim upon the limited view or application of the principle which I am referring to. But, if I might again respectfully put my point, I will then pass from it, that there is no greater property in the pup than there is in the mother, or in the two combined; and I say, with great respect, that, until possession has been taken, the true doctrine of *animus revertendi* does not apply. If you will remember, I was protesting against the idea that migratory instincts, speaking of the herd as a whole, can be turned into *animus revertendi*, but my main proposition, which I enunciated a few moments ago, is, that, until possession has been taken in the sense that that animal has been in such circumstances that the man has actually captured it, the doctrine of *animus revertendi* has no application of any sort or kind.

The wild deer that is in the park, and that never has been tamed or reclaimed at all equally has the *animus revertendi* to return to feed, perhaps to the same pastures as the tame one. The hind that drops the calf has the same *animus revertendi* to return and feed the calf wherever it may be; but until possession has been taken, neither in one case nor in the other is there any property.

But it may be said to me — You are not stating the law as to the strongest case that can be put against you sufficiently fairly.

Before I come to that however, I would ask Mr Justice Harlan's attention in justification of what I have said, that so far from the doctrine of the rooks not being fit for food, being the *ratione decitendi* or the basis of the judgment in *Hannam* v. *Mockett*, in a passage which unfortunately is by a inadvertence not set out in the United States Case, immediately following where they do stop, and within a few lines of it, this passage occurs :

> And even with respect to animals *feræ naturæ*, though they be fit for food, such as rabbits, a man has no right of property in them. In Bolston's Case, it was adjudged that if a man makes coney burroughs in his own land which increase in so great number that they destroy his neighbour's land... he has no property in them.

Of course you know, Mr President, that " conies " are rabbits. It is the word that is used in this case to describe rabbits.

Mr Justice Harlan. — That means that he has no property in the wild animals simply because they are wild.

Sir Richard Webster. — No, Sir ; simply because they are coming back; they are supposed to have gone off; I agree that they are rabbits supposed to have gone off the land of the man who made the coney burroughs on to another man's land.

Mr Justice Harlan. — On what land are they killed ?

Sir Richard Webster. — They are killed on the land of the stranger. There are two adjoining proprietors, A and B. A makes coney burroughs, or in other word a house for the conies, feeds them, if you like, puts down turnips in hard weather in order that the conies may not eat his trees. The rabbits run out of their holes and run on to the land of the adjoining owner B; B shoots them. They are B 's rabbits when he has shot them, and A has no claim against him, in other words although he made the coney burroughs, A has no property in them. I think, Sir, that as to the distinction which you have put to me, tending, to remove the force of my argument based on *Hannam* v. *Mockett*, I have satisfied you that it is impossible on a fair examination of this judgment to come to the conclusion that the fact that the rooks were not ordinarily fit for food had any thing to do with the judgment at all.

Senator Morgan. — If C shoots the conies on the land of B, they belong to B *ratione soli?*

Sir Richard Webster. — If C reduces into possession, by killing, the wild animals on the land of B, the dead animal it belongs to B. That is a fiction of the law.—

Senator Morgan. — Ah!

Sir Richard Webster. — Well, Senator, I am not unwilling to grapple with the point.

Senator Morgan. — I beg your pardon ; I did not think it was a fiction of the law, I thought it was a provision of the law, a decision.

Sir Richard Webster. — Really I used that expression, but I did not mean fiction in that sense. I merely meant the dead animal being a thing

which, as was said in the House of Lords, is in somebody's possession, it is given by our law, contrary to the civil law, contrary to the Roman law

The President. — And to the French law also.

Sir Richard Webster. — Yes. The possession is given to the man on whose land it falls and not to the trespasser.

Senator Morgan. — Suppose that C when he kills the coney is on the public highway and kills it there. Whose property is it then?

Sir Richard Webster. — I believe it would be the property of the killer.

Lord Hannen. — Other questions may arise in that case. If it is only a right of way, the property may belong to another person.

Sir Richard Webster. — Yes; you have to consider what kind of a road the highway is.

Senator Morgan. — The King's highway where everybody has a right to go, and nobody has a right to trespass upon the property of his neighbour?

Sir Richard Webster. — I, Mr. President, have been accustomed now by long training, if I can, to go straight to the real point; and the real point is that there is no property in any of these animals until they are captured alive or dead, and therefore it makes no difference to my purpose in whom the property is after they are captured, after they are dead. If I am well founded — and I am quite willing to stake my case upon it — that there is no property in wild animals until possession has been taken of them, and that the only effect of the *animus revertendi* is to preserve the property acquired by the taking of possession as long as the animal is coming back and intends to come back to the premises of the person who has reclaimed or tamed it, the whole question of whose property it is after it is dead is absolutely academic. It throws no light whatever upon the matter. According to the French law, as you have said, and as I have found out myself by research, the animal killed on the property of another man belongs to the man who shot it. According to the English law and the doctrine that a man shall not take advantage of his own wrong the animal belongs to the man on whose land it lies when it is dead.

The President. — That is a special provision of the law.

Sir Richard Webster. — It is a special provision, and it does not advance us on the road one single step.

The President. — It seems contrary to the principle?

Sir Richard Webster. — I do not really know whether it is contrary to the principle or not. It seems to me entirely — I will not use that word fiction again — a rule one way or the other. It makes no difference to the point we are considering, and it seems to afford no light or assistance.

The President. — You are aware that under the French law a man who has a wood in which are conies is responsible for the damage which

the conies doto a neighbour; but that does not alter, I believe, the question of property.

Sir Richard Webster. — But also by the French law, Mr President, if the conies run out on the other man's land that other man may shoot them.

The President. — Yes.

Sir Richard Webster. — And therefore, as a conclusive answer, as far as property is concerned, the man out of whose wood they have run has no property in those conies. And they might equally be said to be the property of the man on whose property they have run.

Mr President, may I point my argument in one sentence, showing you the bearing of the two limbs of the argument. I assume I have made my ground good, and to avoid repetition I assume that I have satisfied you that there is no property in a wild animal going on to a man's land simply by virtue of its going there; that he has only got a right of killing it and capturing it and treating it as his keeping other persons off his land.

That animal runs away, swims away, or flies away from the man's land. How can the fact that the animal intends by natural instincts to return to that same piece of land give the man a greater property than he has when the animal is on the land. If I have not made my point clear though I hope I have, let me repeat myself. The animal comes on to my land. I assume for the purpose of my argument that I have shown you that according to the law of all civilized nations I have no property in that wild animal. The animal leaves the land, meaning to come back the next year, if it has any intention at all by natural instinct to come back to the land. When it is off the land in the sea how can the *animus revertendi* in that sense, the instinct to return, give me when the animal is off my land, a greater property than I had when the animal was on it. Sir, I submit to this Tribunal that the more this question of property is examined the more impossible — I will not use any word which my friends may think not sufficiently respectful to their position — the more impossible their position becomes. It may be said that I have not correctly stated the law as to these cases where the *animus revertendi* continues property — not *gives* it, please. It never does anything but continue property. The *animus revertendi* only continues the property which has been created by some previous act.

The President. — I do not believe the contrary was argued, Sir Richard.

Sir Richard Webster. — I do not know that, Sir. I have no right to assume it.

The President. — I believe the question was about possession.

Sir Richard Webster. — Would you be good enough to look, Mr President, at page 109 of the United States Argument, where in a book of the highest authority, cited by everybody with approval, cited by my learn-

ed friends as supporting their proposition — I mean the second book of Bracton — the language is :

> In the first place, through the first taking of those things which belong to no person, and which now belong to the King by civil right, and are not common as of olden time, such, for instance, as wild beasts, birds, and fish, and all animals which are born on the earth, or in the sea, or in the sky, or in the air ; wherever they may be captured and wherever they shall have been captured, they begin to be mine because they are coerced under my keeping, and by the same reason, if they escape from my keeping, and recover their natural liberty they cease to be mine, and again belong to the first taker

Can anybody have the hardihood to suggest that the seals do not recover their natural liberty?

The President. — I thought you argued that they had never lost it.

Sir Richard Webster. — Certainly.

Senator Morgan. — The first question is, what is their natural liberty? Is natural liberty feeding in the sea or existing and being born upon the land.

Sir Richard Webster. — Senator, with very great deference, it does not touch my point the least in the world. I care not what view you take, whether they are upon the land and get all their food upon it and do not go out into the sea at all. My position is, you do not get any property, according to the law of all civilized nations, until possession has been taken.

Senator Morgan. — That is, provided they are animals *feræ naturæ?*

Sir Richard Webster. — Certainly ; but we must not have the question shifted every moment.

Senator Morgan. — No ; I do not shift it at all. I supposed you meant subject to that qualification.

Sir Richard Webster. — I hope so. The seals have never lost their liberty. The seals that are driven and killed possibly have not much liberty left. The seals that are not driven and go away have never lost their liberty at all. If a man has tried to drive them if he let them go he does not restrain their liberty.

The President. — I believe that is agreed between both parties, what you have just stated.

Sir Richard Webster. — It may be, Mr President. Of course it is not possible to argue every point at the same moment ; and that is why I reminded the learned Senator that the introduction of the suggestion which he was good enough to make to me did not bear upon the argument which I was proceeding upon. I was proceeding upon the theory that originally the seal was an animal *feræ naturæ ;* that it never has lost its liberty ; and that never having lost its liberty no possession has been taken of it ; that no possession or occupation having been taken, the doctrine of *animus revertendi* has no application at all. I was met with the case of the bees ; and accordingly I desire to say that the strongest case they can put, namely, that of those bees, fails them altogether.

Now Bracton puts it on their originally having lost their liberty :

But they recover their natural liberty then, when they have either escaped from my sight in the free air, and are no longer in my keeping, or when they are within my sight under such circumstances that it is impossible for me to overtake them. Occupation also comprises fishing, hunting, and capturing.

Now then, here is the point the Senator put to me about wishing to drive them :

Pursuit alone does not make a thing mine, for although I have wounded a wild beast so that it may be captured, nevertheless it is not mine unless I capture it. On the contrary it will belong to him who first takes it, for many things usually happen to prevent the capturing it. Likewise, if a wild boar falls into a net which I have spread for hunting, and I have carried it off, having with much exertion extracted it from the net, it will be mine, if it shall have come into my power, unless custom or privilege rules to the contrary.

There were certain privileges about wild boars that prevented people from catching them at one time, and that was what Bracton was referring to.

The President. — Was that under the feudal law or in general?

Sir Richard Webster. — I think they were under the feudal laws.

Occupation also includes shutting up, as in the case of bees, which are wild by nature.

I do not know whether the American Judge referred to meant to contradict this or not.

For if they should have settled on my tree they would not be any the more mine, until I have shut them up in a hive, than birds which have made a nest in my tree, and therefore if another person shall shut them up, he will have the dominion over them. A swarm, also, which has flown away out of my hive —

That is to say, which has already been reduced to possession in the hive: —

is so long understood to be mine as long as it is in my sight, and the overtaking of it is not impossible, otherwise they belong to the first taker; but if a person shall capture them, he does not make them his own if he shall know that they are another's, but he commits a theft unless he has the intention to restore them. And these things are true, unless sometimes from custom in some parts the practice is otherwise

Now, I should ask the Senator kindly to let me read this great authority upon the question which he introduced a moment ago into my argument, as to whether seals are domestic or not.

What has been said above applies to animals which have remained at all times wild; and if wild animals have been tamed —

Is there any living being who suggests that these seals have been tamed? Could any reasonable man suggest it for a moment.

if wild animals have been tamed, and they by habit go out and return, fly away —

That means with a tamed habit,

such as deer, swans, seafowls, and doves, and such like, another rule has been

approved, that they are so long considered as ours as long as they have the disposition to return; for if they have no disposition to return they cease to be ours. But they seem to cease to have the disposition to retun when they have abandoned the habit of returning; and the same is said of fows and geese which have become wild after being tamed.

Mr President, there is not, I submit, the shadow of a doubt that this habit of returning means the habit of returning after they have been tamed, not the habit of returning while they are in a wild condition.

The President. — You made your case perhaps easier in saying that the seals had been stated to be tame. They were not precisely argued to be tame. They were argued to be the object of what Mr Carter called a husbandry.

Sir Richard Webster. — With great deference, Mr President, there is no case in which what my friend Mr Carter calls the creation of a husbandry has been supposed to be equivalent either to taming or taking possession of the animal. The sparing and not slaughtering the whole, the abstaining from the right to kill on your land never has been suggested as giving property. I could give instances without number. Why, in the case of the rabbits, there is not as much husbandry in the seals as there is in the rabbits. It seems to me, Sir that the mere statement of the case of rabbits is sufficient. The rabbit man, on the hypothesis, may construct the burrows. Nothing of that kind is done for the seal. No house is built for them. The man, if he chooses to do it, can feed the rabbits, to induce them to return.

The President. — You compare the seal to the rabbit, upon which there is no doubt. Suppose we compare them with the bee. The bee is not a tame animal.

Sir Richard Webster. — Let me compare it, Sir, with the case of the bee. In the case of the bee, the man builds the hive, builds the house in which the stock is going to be hived. As a matter of fact, as you no doubt know perfectly well, he does in hard weather actually feed the bees, and he does make convenient places in which the bee can store its honey; and modern invention has actually assisted him in the formation of the comb in which the honey will be placed.

Lord Hannen. — Those are the grounds upon which the French law is basedin the case you refer to.

The President. — You know you just objected to calling the pigeons tame. You would not call the bees tame, either. I think the word "tame" is not quite correct.

Sir Richard Wesbter. — I am afraid, Mr President, I did not make my meaning clear. I did not object to your calling the pigeons tame. I merely suggested I was not dealing with the case of tame animals in that sense, but of animals which had been by the act of man induced to take up a lodging in his dovecote, to go out and return, and I desired the distinction to be drawn so that you would not think I was referring to animals that would come and feed out of your hand. The bee is hived, and, as

the French law has pointed out, hived by the act of man, and induced to return to that place, as Savigny puts it, where the owner keeps them, where the owner has the means of taking possession of them. He can shut up the door of the hive and carry the whole hive away with him. That is the degree of possession in the case of the bee; and it is quite remarkable when you remember that the mere settling of a swarm of bees upon your tree gives you no property in them.

Senator Morgan. — Suppose the bees go into the tree and make their hive there without your assistance, do not they become your property?

Sir Richard Webster. — Simply and solely because you have got the power of cutting down the tree and taking the honey, and nobody else can do it.

Senator Morgan. — That is the whole matter. You have got the dominion over it.

Sir Richard Webster. — If you say so, that is sufficient. I can say no more.

Senator Morgan. — I suggest that; I do not assert it.

Marquis Visconti Venosta. — So you say that the animal has not the *animus revertendi* unless it returns to the place where man has previously kept it. That is your contention?

Sir Richard Webster. — That is my contention; that according to the law of all civilized countries, *animus revertendi* has no operation at all until the man, has had the animal in his keeping. It is not my own language, Mr President.

Mr Justice Harlan. — You mean in his actual manual keeping?

Sir Richard Webster. — No.

Mr Justice Harlan. — I did not so understand you, but I thought I would ask the question, so that you might bring out the point.

Sir Richard Webster. — I do not think it could fairly be put upon me that I meant that. I took the case of deer, that are induced to come into a stable, and which by food being placed there, and by men going among them, can be fed and tamed in the sense which Mr Carter relies upon as was the case of the deer in the park of Lord Abergavenny. It would not be right to say they were in the manual possession, in the sense of being held, but they were in such a possession that at any moment the man can take possession of the whole of those which are tame, and they have got the intention of returning to the place where the man has had them in possession.

The President. — I beg your pardon; it perhaps is not quite regular, but it might be well to ask Mr Carter, or one of the other gentlemen to tell us what their view of this matter is. It would make the case more easy for us.

Sir Richard Webster. — I am afraid it would be inviting their reply now, Mr President. That is all.

The President. — Of course if you would prefer to continue your argument.

Sir Richard Webster. — I have said all I desire to say.

The President. — I though there was no difference between you as to *animus revertendi*.

Sir Richard Webster. — By all means, Mr President, if you will put the question, I shall be only too glad to submit to your wishes.

The President. — No ; I think it will be answered later ; and you might perhaps go on with your argument.

Sir Richard Webster. — Mr President, I will only say, if you will forgive me for repeating it, that in every one of our books of authority, Blackstone, Bracton, Savigny and all the books, the law been stated in this way, without deviation. My position is that there is nothing to the contrary. You are asked to invent this law for the benefit of the United States. The learned Senator put to me just a moment ago the question, supposing the wild bees light in your tree, you have got the dominion over that tree and consequently the property in that swarm.

Senator Morgan. — I mean if they build their nest inside the tree, go inside and make a hive there, if it is a hollow tree, without your assistance.

Sir Richard Webster. — " Though a swarm lights upon my tree, I have no property in them until I have hived them any more than I have in the birds which make their nests there ".

Senator Morgan. — That may be true. But suppose they hive themselves in that hollow tree without your assistance ; then whose property are they ?

Sir Richard Webster. — They are simply nobody's property at all. My submission is that the man into whose tree they have gone has no property in them whatever, except in the sense that he has a greater right and power of taking them than anybody else. There is no book, and I think no case which, when examined, suggests the contrary for a single moment. I cannot do more, Sir, than answer your question, because I think that will be exhaustive of the matter.

Senator Morgan. — I had running in my mind an incident that happened to pass under my observation. I suppose you will pardon me for stating it.

Sir Richard Webster. — Certainly.

Senator Morgan. — On the Tennessee River, a few miles below Chattanooga a cave has existed for many years, and has been occupied by bees, which have made many tons of honey there ; and I think it has never been doubted that the bees and honey, and everything there belonged to the owner of the soil. He had no agency in them, and no inducements for the bees to return to it. It has been going on there in that way for a great many years.

Sir Richard Webster. — There is no case in the books in which any such question has ever been raised and decided ; and most unquestionably in the case in which it has been raised, it has been put upon the right, *ratione soli*, of taking possession of the animals that have come

there by their natural instinct, and have not come there by any act of man.

I apologise to you, Mr President, and the other members of the Tribunal, for dealing with a matter which was so fully dealt with by my learned friend, the Attorney-General; but I hope the Tribunal will not think that in endeavouring to make this question of the supposed analogy between bees, seals and pigeons clear, I have unduly occupied the time of the Court; because if there be a lingering doubt in the mind of the Court, I prefer, at any rate, that our case shall be presented, and that no member of the Tribunal shall say that we have endeavored to shrink from any point or avoid any point which any member of the Tribunal thought it important to make.

The President. — I think your observations were very useful, Sir Richard.

Now I desire, Mr President, to answer if I can of another of the propositions which we think, as I said, involves a fallacy. I am bound to say that here I can rely a little bit on the difference between Mr Phelps and Mr Carter. I will not ask them before the Court to settle their little differences, but Mr Phelps is of opinion, and I shall submit rightly of opinion that the United States would be doing no wrong if they killed every seal on these islands, and in law they have the right to kill every seal if they can, and when they have killed all the seals they will have the property in them — my learned friend, Mr Carter, to support his most ingenious argument says that no possessor of property has an absolute title, but only the usufruct is given him. You will find it in print at page 59.

> The title is further limited. These things are not given him, but only the usufruct or increase.

Then my learned friend, Mr Coudert, sides with Mr Phelps. Mr Coudert thinks they might have killed every seal also without breaking any law. I was much interested in this discussion, though not as a lawyer; and I looked through all the authorities so courteously sent me by Mr Carter, and I find this doctrine of man only having the usufruct, and only being allowed to enjoy the income and not touch the principle — only allowed to take the increase and not diminish the stock, has no place in law whatever. It only finds a place in the writings of political economists who speak of the gain there would be to the community at large by a man only using a portion of his wealth, that is to say not spending every thing he has, but only living out of the fruit of his property.

Lord Hannen. — But what practical bearing has that, whether they would be entitled to do some thing which they never intended to do?

Sir Richard Webster. — Mr President, I should, perhaps not as crisply as my Lord, have made that comment, and I only point out it is used by my learned friend, Mr Carter, as ekeing out the claim to property by the United States. It is suggested bŷ Mr Carter that the property is to be given to them, I suppose on legal principles, because there has been that

exemption. Well, perhaps I may be permitted to say I have looked through every law-book I could get, both English and American that we have, to see if there was any foundation for this rule according to the law of any of these countries, and certainly there is not, and it is extremely well dealt with by the French Code by Article 544. It puts it in a way I cannot improve upon.

> Property is the right of enjoying and disposing of things in the most absolute manner, provided one does not make a use of them prohibited by laws or regulations.

So that unless, in other words, the law has said, you shall not kill an animal at a certain time of the year, for some reason or other, there is no principle of law that confines the property in any animal to simply enjoying and using the annual produce of it.

Now where is this principle of property to stop if my learned friends are correct in this contention? I have taken some interest in natural history for many years, and I would only remind you of the number of instances which are analogous in which, according to the law of all nations no property is given, and I do not propose a better one them that of migratory birds. If it was a question of natural history discussion, I could give many instances of cases in which particular breeds of birds breed in two or three places which are known. Every member of the families of birds could be destroyed by the owners of these particular places. Their eggs could be taken; their young could be taken, and the race in a very few years exterminated; and I say that it is idle to endeavour to apply this principle to one particular class of animals which have no feature which in law creates any distinction. These Pribilof Islands happen to be a very remarkable instance. On them there are myriads of birds that frequent year by year the islands, come back every year in regular succession, and breed there and produce their young there; if the principle is worth anything it must be suggested that property in them should be given, because the breasts of those birds could be plucked for the adornment of ladies' hats, or the stuffing of cushions or quilts or making of warm coats for people, out of which a most useful industry has sprung.

The President. — Do they not regularly get the eggs of those birds.

Sir Richard Webster. — They do, but I put it higher than the eggs — where the birds were most useful for the benefit of mankind. That is to say that you actually want the animal or the bird itself — it might be the plumage of the Eider duck; but it is not confined to that by any means — there are numbers of other birds whose plumage is of value and much more a blessing to mankind than the seal skins over which my learned friend Mr Carter shed tears; but I put it to you if this suggested law is worth anything it must apply to persons whose birds breed in his cliffs and on his land, and go out to feed at sea 10 or 15 or 20 miles away, and which have been slaughtered by United States citizens and other persons without let or hindrance all over the world, because there is no property.

I entirely deny that there is any distinction between fish and birds : perhaps I may take an opportunity next week of saying a word as to the fallacy which underlies my, learned friend Mr Carter's argument in the matter of fish. But as I have not time to do that to-day, I might tell you some of the instances of fish which would give as great a claim to property. On many of the rivers of the east coast of Scotland the fish of the river are as distinct as they can be. There are two rivers that run into the Moray Firth : the Ness and the Beauly. They are Salmon rivers and they have perfectly distinct Salmon. No Ness salmon are ever seen in the Beauly, and no Beauly Salmon are ever seen in the Ness. They go out and feed in the Ocean and are caught promiscuously there and if the owners of those rivers did not exercise the abstinence that my learned friend talks about they could be killed to such an extent that in a few years no fish would be left.

The President. — Are there not laws relating to that?

Sir Richard Webster. — None except a close time, and a provision that the nets shall not be put in more than a certain number of hours a week. There are local laws that in every week nets must be left off for 48 hours, or 24 hours as the case may be, so that the fish can get up and down again, but that is entirely by municipal legislation. So far as actual property is concerned in these fish there is no distinction. They can be identified when caught as to which river they have come from, and they are, as a matter of fact, though I am anticipating, artificially hatched and bred largely to increase the stock in a great number of places : a form of industry which is impossible according to our present knowledge of seals, and yet in this case property in the fist has not been recognized.

The President. — Are they ever fished in the open sea?

Sir Richard Webster. — Yes.

The President. — There is no municipal law against that?

Sir Richard Webster. — No; there is no municipal law against that, except on some of the foreshores there are certain privileges of setting nets; but that is a privilege given to certain persons under Royal franchise, and has nothing to do with the open sea.

Senator Morgan. — In your studies of Natural History, Sir Richard, which seem to be very broad and very exact, have you found an animal, feathered, furred, or scaled (the coating makes no difference) that, by its instinctive characteristics, surrenders itself in regard to its power of escape to the same extent as the fur-seal does on the land?

Sir Richard Webster. — That entirely depends on what you mean, Senator Morgan, by "surrenders itself". When I come to that part of the case, what I am going to suggest to you is, except people get round and frighten it, it never surrenders itself at all. May I tell you an exact case that seems in point? One of the most interesting birds on the coast of Scotland is the Solan Goose, which is a very beautiful bird that breeds, as far as I know, in two or three places only, and one of those places is off the Orkneys, 100 miles out, — there are two Rocks, called the "Stack"

and the "Skerries", out in the Atlantic; and people go to take a certain number of eggs, and the hen-birds, the wildest known, will sit on their nests, so that you can hit them with a stick as you pass by.

I have known people who have done it, they will hiss at you, and these wild birds, while sitting on their nests will allow you to knock them on the head, if you like.

Senator Morgan. — Then, as to the male bird?

Sir Richard Webster. — Well, he would not be much use without the hen.

Senator Morgan. — So that, if you kill the males and not the hens, there will not be much progress in killing.

Sir Richard Webster. — The male bird would fly away; and, if you attempted to drive the bull-seals away, you would not have much progress then.

Senator Morgan. — But they do not seem to escape at all.

Sir Richard Webster. — I cannot tell what is in your mind as to the habits of these seals — I shall have to trouble you some other day with regard to that; but that I should not be thought to have my answer ready, I submit what happens with regard to these seals is, that they are frightened and from fear and fear alone are made and not induced (in the ordinary sense of the word) to travel long distances out of what I shal call their natural element are reduced into a condition where they suffer immensely, and being in that condition from which they cannot escape, they are then killed, and if that is surrendering themselves — supposing that is what you mean by it — I have not a word to say.

Senator Morgan. — I never heard that seals were so frightened as to haul out of the sea on to the shore.

Sir Richard Webster. — No, but you were good enough, as I understand, to put it to me that they surrender themselves so that they could be dealt with by man.

Senator Morgan. — I do not mean by a voluntary act, but by an instinct from which they cannot escape.

Sir Richard Webster. — Of course, you have more knowledge than I have of this, but I do not suppose a three or four year old seal, when he comes out for the first time, knows that he is going to be driven, I venture to think that if a seal comes out upon the island, he has no idea he is going to have boys to shout round and drive him up till he is in the condition to which I will call attention some day or other, and then to receive the final blow.

Senator Morgan. — And I have no idea that he would have any such expectation, but if he had, I think he would come out any way.

Sir Richard Webster.. — I do not think the evidence supports your inference, Sir; but that is not a matter we are discussing. You must not take me as saying anything to show that I accede to or acquiesce in your view of the facts.

I entirely deny, you must understand, that that condition of things is

at all different from that which exists in the case of many other birds and animals; and I say, submitting or surrendering in that sense is common to many other animals besides the seal. It is as common an incident in the life of the salmon as it is in the life of the seal. It is obvious, at this time of the day I should not be justified in attempting to answer you at greater length than I have in the few words I have addressed to you in reply to your question.

[The Tribunal then adjourned till Tuesday next, June 6th, 1893 at 11. 30 o'clock, A. M.]

The President. — Before you begin, Sir Richard, Mr Gram wishes to say something.

Mr Gram. — The Appendix vol. I to the United States Case gives the text of the law and regulations relating to the protection of whales on the coast of Finnmarken. It was my intention later on to explain to my colleagues these laws and regulations, by supplying some information about the natural conditions of Norway and Sweden which have necessitated the establishment of special rules concerning the territorial waters, and to state at the same time my opinion as to whether those rules and their subject matter may be considered as having any bearing upon the present case. As, however, in the later sittings reference has repeatedly been made to the Norwegian legislation concerning this matter, I think it might be of some use at the present juncture to give a very brief account of the leading features of those rules.

The peculiarity of the Norwegian law quoted by the Counsel for the United States, consists in its providing for a close season for the whaling. As to its stipulations about inner and territorial waters, such stipulations are simply applications to a special case of general principles laid down in the Norwegian legislation concerning the gulfs and the waters washing the coasts. A glance at the map will be sufficient to show the great number of gulfs or " fiords ", and their importance for the inhabitants of Norway. Some of those " fiords " have a considerable development, stretching themselves far into the country and being at their mouth very wide. Nevertheless they have been from time immemorial considered as inner-waters, and this principle has always been maintained, even as against foreign subjects.

More than twenty years ago, a foreign government once complained that a vessel of their nationality had been prevented from fishing in one of the largest fiords of Norway, in the northern part of the country. The fishing is carried on in that neighborhood during the first four months of every year, and is of extraordinary importance to the country, some 30,000 people gathering there from South and North in order to earn their living. A government inspector controls the fishing going on in the waters of the fiord, which is sheltered by a range of islands against the violence of the sea. The appearance in these waters of a foreign vessel pretending to take its share of the fishing, was an unheard of occurrence, and in the ensuing diplomatic correspondence the exclusive right of Norwegian subjects to this industry was energetically insisted upon as founded on immemorial practice.

Besides Sweden and Norway have never recognized the three-mile limit as the confines of their territorial waters. They have neither conclu[illegible]e acceded to any treaty consecrating that rule. By their municip[illegible]ws the limit has generally been fixed at one geographical mile, or one-fifteenth part of a degree of latitude, or four marine miles; no narrower limit having ever been adopted. In fact, in regard to this question of the fishing rights, so important to both of the united kingdoms, these limits have in many instances been found to be even too narrow. As to this question and others therewith connected, I beg to refer to the communications presented by the Norwegian and Swedish members in the sittings of the Institut de Droit International in 1891 and 1892. I wish also concerning the subject which I have now very briefly treated, to refer, to the proceedings of the Conference of Hague, in 1892, (Marten's *Nouveau Recueil General*, 11ème série, volume IX), containing the reasons why Sweden and Norway have not adhered to the Treaty of Hague.

The President. — I would beg the Counsel of both parties to keep in remembrance the observations of Mr. Gram if they are inclined to quote the example of the Norwegian Waters; but I wish to state once more very distinctly that the question of the definition of what are territorial waters is not before us, and it is not the intention of this Tribunal to express any opinion as to the definition of territorial waters.

Sir Richard Webster. — It is only necessary, Mr President, in acknowledging, so far as the Counsel of Great Britain are concerned, our appreciation of the courtesy of Mr Gram with regard to the Memorandum he has been good enough to read to us which will no doubt appear upon the Notes of the Proceedings, for us to say it is exactly in accordance with the view which I understand the Attorney General to have expressed, and which I expressed a few days ago, in regard to this matter; that, knowing perfectly well the question of territorial waters was not before you, I merely stated, so far as my own reading and information went, the doctrine of territorial waters in Norway and Sweden had to be considered with reference to the special configuration of the coast. And I did not know, one way or the other, whether or not Norway had either adopted the three-mile limit or insisted upon a wider range. It is clear, from the Memorandum that the learned Arbitrator has been good enough to read to us, the view I expressed was in accordance with the contention of Norway; and, further than that, I would point out, for the reasons with which I was not acquainted, — the discussion at Hague, — it is clear that this matter has been treated specially by Norway and Sweden in connection with their claim. If we had been discussing the question of the claim of the United States to a territorial jurisdiction, which is for the purpose of their case disclaimed, similar considerations might have arisen; but they do not arise, as the whole of my learned friend's argument is based on other considerations, to which I shall have to call attention later on.

Before I conclude what I desire to say on the question of property I wish to supplement a few observations on the subject to which I referred,

as a little doubt was thrown upon the accuracy of my information by Mr Senator Morgan when I made my statement with regard to Japan. First he intimated that Shimonoseki Straits had been opened a good many years before; and second he thought I was not correctly informed in my suggestion that the United States relied upon treaty. I have obtained the most accurate information on the matter and in both those matters I may say my information was strictly accurate. The Shimonoseki Straits, and all the waters of Japan, had prior to 1854 been absolutely closed to foreigners for upwards of 250 years, the only persons who had any settlement there were the Dutch who had a small settlement. In 1854 a treaty of navigation and for the opening of certain ports was made by the United States, — and I only surmised this the other day, because I had not had the opportunity of looking it up, — the first treaty was made by the United States in 1854 and it was not till after that treaty that 14 other Powers including Great Britain and France came in in the year 1857 and 1858, and the right to navigate the Shimonoseki Strait had been claimed by all the powers by virtue of these treaties and by no other claim so far as I have been able to ascertain.

The learned Senator was perfectly accurate in referring to its narrowness but he rather stated it against himself, because it is less than a mile wide in one place, and the opening at the other end, clear of the islands, is less than four miles, so that it would have been difficult unless there had been some immemorial usage or some Treaty, for any nation such as Great Britain or France to have claimed a right of navigating in such waters. The Treaty was in fact concluded with the Shogun, and when the authority of the Emperor was restored it was not considered necessary to ratify again the Treaties. The only alteration was that in the case of Great Britain an Order in Council was issued substituting the name of the Emperor for the name of the Shogun; and when the disturbance by Prince Choshiu arose all the Powers combined, as I stated on the last occasion, and expressed their intention in identic memoranda to aid the then Government of Japan in putting down the interference of the rebellious prince Choshiu who was purporting to interfere, and in fact interfering, with the rights of navigating under those Treaties. I mention the matter now as I was, of course, anxious to look up any point as to which there was a lingering doubt in the mind of the Tribunal. I have ascertained those facts, and I need not say that all the information in my possession is at the disposal of any of the members of the Tribunal.

Senator Morgan. — Well Sir Richard, I think it only right to say I have that Treaty of 1854 before me, and the United States have the right, under Article 2 to enter the ports of Simoda and Nagasaki and the port of Hakodadi, which I think is not on the straits of Shimonoseki. Those are the only ports they had the right to enter.

Sir Richard Webster. — Is not that the Treaty with the favored nation clause in it?

Senator Morgan. — You spoke of a Treaty with the United States in 1854, by which this strait was open to the commerce of the world. I do not find that.

Sir Richard Webster. — I think I said supplemented by the other Treaties under which the other Powers came in. It will be found that prior to that Treaty of 1854 those Straits were closed, and they remained open from 1854 till Prince Choshiu attempted to close them in 1864 as I mentioned the other day.

Senator Morgan. — I meant to state the attitude of the United States Government towards that country — they claimed no Treaty right of going through the Straits of Shimonoseki at all. They claimed it on the ground that it was part of the high sea, because it was a strait connecting two great seas — the Sea of Japan on the south, and the Yellow Sea, I think it was, or the Sea of Corea on the north.

Sir Richard Webster. — Well, Mr President, I must not appear to enter into a controversy with the learned Senator, but I looked at the identic notes that were signed in the year referred to, and I can only say I believe it will be found that the United States claim was founded on Treaty. It seems to me sufficient for my purpose to call attention to that, and as I cannot say that my information as to the facts accords with what the learned Senator says, I have performed my duty in calling the attention of the Tribunal to what I understand to be those facts.

Now, Mr President, I had practically concluded what I desire to say on the question of property at the sitting of the Tribunal on Friday last, but I presume I may be possibly expected to make one or two observations applicable, so to speak, to this particular tribe of animals, the seals. I do not wish to add anything to the general description of them given by my learned friend, the Attorney General. I confess I was somewhat surprised in reading through the argument of Mr Coudert, and the passage I refer to will be found at page 594 of the revised print before the Tribunal, when he stated that seals were only amphibious as the result of education. It struck me as a somewhat strained view. We know on the evidence that although young seals would be drowned if they were allowed to remain in the water too long, that is to say, that they cannot sustain themselves in the water during the first years of their birth any more than birds can fly when they are first hatched———

Lord Hannen. — You used the word " years ". I suppose you would say " months ".

Sir Richard Webster. — I ought to have said " days " of their birth any more than birds can fly; but we know that the instinct is there, for there is abundant evidence that pup seals have swum when in the water. I mention this to show that the argument of the United States has gone to very remarkable lengths when it leads my learned friend to suggest that the amphibious nature of the seals is only the result of education.

I wish to say a word on that which both my learned friends, Mr Carter and Mr Coudert, regarded as of importance, — the question of intermingling; and certainly, from a most careful review of this evidence, I say he will be a very bold man who would suggest that these seals did not intermingle, whether you take the evidence of the United States alone or whether you take the body of evidence on both sides.

I will remind you in a few moments of one or two matters which bear directly upon that. You will remember that my learned friend, the Attorney General, read to the Tribunal extracts from the evidence of the fur murchants, showing the existence in the Alaska catch of skins which could not be distinguished from the Commander and Copper Island skins, and in the Commander and Copper Island catch of skins which could not be distinguished from the Alaskan. He further read to the Tribunal evidence to show that in the same catches there are also skins in the Alaska and Copper Islands respectively which practically show interbreeding. I desire to supplement that evidence with one or two observations, directing the attention of the Tribunal to two or three matters in the same connection. First, I should like to tell the Tribunal that there are no less than 32 Furriers of independent position, many of them giving evidence for the United States, to many of whom my learned friend, Mr Coudert, appealed as being witnesses of impartiality and integrity, — there are 32 witnesses, who will be found on pages 238 to 251 of the 2nd volume of the British Counter Case, who speak to the finding of these skins, as I have said, indistinguishable among the Alaskan catch from the Copper and Commander Island catch. Mr Coudert felt that that would be important evidence, for, on page 618 of the Revised Print. he said : —

> But upon this you will observe that there is not one single witness who will testify that he ever found a skin which he would call a Copper skin, in a consignment of Alaskan skins.

I do not, of course, want to prove my learned friend to be in the wrong, because it was a matter to which perhaps he had not had his attention sufficiently directed to; but so far from there not being a single witness, there are that number of witnesses to which I have referred, and many of them (some 15 or 20) state the actual percentage or extent to which they think those skins occur.

Now, Sir, there is another body of testimony to which I desire, for a few moments, to direct the attention of the Tribunal—that is the evidence of no less than 57 witnesses who having sailed across Behring Sea, and having sailed across the Pacific Ocean south of the Aleutian Islands, state they have seen on a variety of voyages, at a variety of latitudes, and a variety of positions, practically continously scattered seals across the sea. Well, Sir, of course it may be true that this kind of evidence is to be wholly disregarded, but I would ask the Tribunal first to consider for a moment what the probabilities of the matter are. That large masses of seals do go to the Commander Islands, do go to the Pribilof Islands, is of

course plain. It is stated in the first instance by the British Commissioners, and recognized by every one who has investigated this matter; but when they are on the sea they must, to a large extent, be influenced by what is the actual position of the shoals of fish upon which they feed.

It is now plain from the evidence of the United States witnesses, as well as ours, that the seals feed largely on herrings cod salmon and on other fish — that it is not a fact that they feed solely upon squid or solely upon those animals or fish which would be found on the surface. Therefore that these shoals of fish do shift, is spoken to by many witnesses, and as one would expect from ons general knowledge of natural history; you have therefore the testimony to be found summarized in pages 23 to 27 of the 2nd volume of the Appendix to the British Counter Case. You will find the evidence of 57 witnesses who, sailing across Behring Sea at all times of the summer — after May — sailing across the North Pacific Ocean, even in months which range over a longer period, have found these seals in thin scattered numbers going one or two at a time, or three or four at a time, pratically the whole way over. But Mr President let us for a moment consider what the United States evidence shows upon this matter, because really looked at fairly, and without an attempt to contradict what may be said in support of this theory, I shall submit to this Tribunal that it disproves altegether the theory of non-intermingling. There is the testimony of a witness at page 215 of the 2nd volume of Appendix to the United States Case. His name is Prokopief, and I will just tell you what he proves. Would it be troubling the Tribunal two much to ask them just to open map n° 1 of the United States — I mean the map of Behring Sea and the North Pacific. Just a little to the south-east of the end of the line of demarcation, you will see the Island of Attu. Just to the right of that, you will see the Island of Semichi, and then, a little further about an inch on the map which represents 150 miles to the right, you will see Amchitka. Now this witness says he has seen seals constantly as far as Amchitka and that he has seen them in batches between Attu and Agattu; that he has seen them 30 miles east of the Semichi Islands; so that, if you took the evidence of this gentleman Prokopief, and assume it to be (as I will assume it to be) perfectly honest, the limit to which he reduces the zone where no scattered seals are to be seen is 140 miles.

The zone or the space between which he says he finds there are seals is 140 miles. Now will the Tribunal consider for a moment what the problem is — and bring to bear their general knowledge on the evidence?

It is admitted that seals have come from the Pribilof Islands down to Amchitka. That will be a distance, roughly, of between 500 or 600 miles. The distance from the nearest of the Pribilof Islands to the Aleutian islands is 182 miles. It is put by some witnesses as 200 miles; but I will take the smallest distance, 182. From the Pribiloffs to Amchitka you will see, roughly, is a little more than double that distance; that

would be between 400 and 500 miles however, the seals are supposed to have come and probably have come. Of course, if the seals have crossed over the 30 miles, so much then of intermingling is proved at once; but the seals are supposed to have come from the Commander Islands down, 30 miles east of Semichi. As far as I can judge by my eye, that again would be about 250 miles, I should say — perhaps rather more, 300. I will show presently that seals have also been found right up into Behring Sea near Behring Straits. We know they have been found all along these Aleutian Islands from time to time, and I will also remind you they have been found spread out across *these* seas. Now I want to ask you upon what reasoning — upon what line of thought is it to be suggested that having gone the 500 miles — having gone the distance which would indicate that they are roving about — they do not pass over the 140 miles? What magic is there be in that 140 miles, it being the strongest corroboration of the fact which is sworn to by upwards of 30 independent witnesses, that the skins are, in fact, found identical in the two consignments, and also seem to partake to a great extent of one character and to a great extent of the other. Upon this, let me simply mention a subject which I do not wish to elaborate at length, for reasons which the Tribunal will, I am sure, appreciate.

Mr Phelps. — I beg my friend's pardon, for interrupting him, but I think, if he will kindly read the evidence of this witness which he is quoting he will perceive that he has not understood him quite correctly.

General Foster. — The first paragraph — that is all.

Sir Richard Webster. — I will read the whole of it. He says :

> I am a hunter of the sea otter and blue fox and have lived in this vicinity all my life. I hunt about Attu, Semichi Islands. Have never hunted nor killed a fur-seal. Fur seals do not regularly frequent these regions and I have seen none but a few scattering ones in twenty years. Thirty years ago, when the Russians controlled these islands, I used to see a few medium sized fur seals, on in the summer, generally in June, travelling to the north, I think; for the Commander Islands.

Now, observe that : from the Amchitka Island down to the north-west, — that is, going away over the very branch of the sea in question, if his opinion is right, — from that Island down away to the north-west, I think, to the Commander Islands.

Then he goes on to say : —

> The farthest east I have ever observed them was about 30 miles east of the Semichi Islands; do not think those going to the Commander Islands ever go farther east than that. Those most seen in former times were generally feeding and sleeping about the kelp patches between Attu and Agattu, and the Semichi Islands, where the mackerel abounds.

We know the mackerel are about the most fleeting fish there are. Then he says :

> They decreased in numbers constantly, and now are only seen on very rare occasions.

Whether I misrepresented — I am sure my friend does not mean to

say I misrepresented — whether I misappreciated that evidence, I will leave the minds of the Tribunal to judge.

General Foster. — He does not say that the Pribilof Island seals came to that island.

Sir Richard Webster. — I beg my friend's pardon. I see General Foster's point. It is better for me — but I do not want to argue this case on that theory — if those were only Commander Island seals, because he is speaking of the island of Amchitka. I can prove beyond all question, on the evidence, that the Pribilof Islands seals go and are found — in fact that is the United States Case — all along the north of the Aleutian Islands in Behring Sea. I say that to come to the conclusion that seals do not pass across 140 miles of sea, when they have traversed hundreds of miles, as much at least as 500 or 600 miles, and do traverse thousands of miles, is a conclusion which, except upon overwhelming testimony, the Court, I submit, will not adopt; reminding the Court that the seals from both Islands are the same species. There is no distinction between the animals. Any distinction in the furs is due to the climatic conditions, and possibly the curing conditions of the Pribilof Islands and the Commander Islands respectively; and Mr Senator Morgan, when Mr Coudert was arguing, stated at page 638, that the feeding grounds shifted — could not be located — and that, therefore, it was not possible to define the exact place where the seals might be one year, as with another.

Senator Morgan. — I only asked the question.

Sir Richard Webster. — I am much obliged, Sir, I understand. But Mr President, will you look at the evidence of Captain Hooper? It will be found at page 216 of the American Counter Case. Captain Hooper found the seals in large numbers 300 miles west of the islands. It is no question of females — it is the question of finding seals in large numbers 300 miles to the west. He says :

> During the run of 400 miles from Lat. 58° 22' N., Long. 177°42' W., to Lat. 55°38' N., Long. 174°23' W., no seals were observed, although a careful look out for them was kept at all times.
>
> Numerous seals having been found in these latitude at a distances of 300 miles I infer that the western limit of the range of the Pribilof herd of seals is between two and three hundred miles from the islands and that the herds from the Pribilof and Commander groups of islands do not mingle.

I ask why when numerous seals are found at a distance of 300 miles, it shall from that be inferred that the western limit is between 200 and 300 miles? It is a difficult thing quite to appreciate. I am not unduly or unfairly criticising Captain Hooper's evidence but I point to numbers of seals having been found at a distance of 300 miles from the Pribiloff Islands — I am content to show that those animals, speaking of them as scattered animals — not as thick, dense flocks of them round the Pribiloff Islands — do travel a considerable distance, and again I say : What argument is there which is conclusive; or which you can say is

found in any way sufficiently powerful, to induce you to come to the belief that they do not travel that intermediate 140 miles which is suggested to be the zone of separation between the two herds? I am not now, Mr President, criticising this matter at length. I shall have to deal with it at length when I touch the question of regulations, and I shall then venture to urge before this Tribunal that the opinion of the British Commissioners is completely justified by the evidence subsequently taken. There is a very convenient summary of the evidence upon this matter at pages 23 and 24 of the Supplementary Report of the British commissioners. I am only using this as a part of my argument in order to show what is the existing state of the evidence with regard to the distances to which the seals approach one another. I will begin to read from the bottom of page 23.

In our previous report, as the existence of a certain amount of intermingling had never been questioned, it was not considered necessary to note in detail the evidence and the observations upon which the general statements made were based, but in conjunction with the information since obtained this becomes more important.

Now this is referring to the information they had when they made their Report stating there was intermingling. It goes on : —

This information consisted, in the first place, of statements by pelagic sealers to the effect that, when crossing Behring Sea from the eastern to the western side, fur seals were frequently seen by them in all longitudes ; secondly, of our own observations and of enquiries locally made along the Aleutian Chain.

My friends do not, of course, dispute the accuracy of facts actually spoken to by Dr Dawson and Sir George Baden Powell.

Mr Phelps. — We very much dispute the accuracy of facts which are brought into this Supplementavy Report that we had never heard of before, and we did not understand the decision of the Tribunal to make them evidence. We should contend they are not.

Mr Justice Harlan. — Sir Richard only adopts them as part of his argument, he said.

Sir Richard Webster. — I am distinctly in accordance with the decision of the Tribunal.

Mr Phelps. — I understood my friend to say he was referring to the subsequent information obtained by these gentlemen.

Sir Richard Webster. — My friend, Mr Phelps, misunderstood me. I was referring to what the gentlemen themselves observed in the year 1891, which they had not previously stated in their report, because they did not understand the matter to be questioned. What has been ascertained since is in evidence in the Counter Case. It goes on :

While running to the westward, north of, but near to, the line of the Aleutian Islands, though the circumstances were often unfavourable for sighting seals, and long distances were passed by night, seals were actually seen by us approximately in the following positions :

August 25th. — North of Amukhta Islands, longitude 170° West.

August 25th. — North of Amlia Island, longitude 173° West.

That is going towards the West, of course : they are west longitude from Greenwich. Then it goes on :

August 28th — Near Attu Island, longitude 173° East (one seal).

August 30th — Midway between Attu and Commander Islands, longitude 171° East.

Further to the north, in the vicinity of the 60th parallel of latitude, occasional seals were met with at sea by Her Majesty's ship "Nymphe", and by ourselves in the month of September as far to the westward as 174° 30' West.

We also ascertained from Mr Grebnitsky, Superintendent of the Commander Islands, that fur seals had been seen in 1880, 1886, and 1887, by Russian cruisers when shaping a course from these islands to Indian Point, as far north as the 60th parallel, and at about the intersection of this parallel with the 180th meridian. The position thus defined is within about 180 miles of that in which we ourselves saw the first seals at sea in approaching the Pribiloff Islands from the northward.

Information gathered on this subject in the Aleutian Islands, in 1891, may be thus summarized.

Mr Phelps. — Pardon me, I think myself this question should be determined now. It is a question that we debated at so great a length before the principal hearing commenced — whether these British Commissioners could come in, pending the argument, and, by a new Report, not provided for by the Treaty, and which we have had no opportunity of seeing, much less to answer, add to those facts which are to be considered as evidence before this Tribunal.

We did not understand the decision of this Tribunal — we may have misunderstood it — to be that facts of this character became evidence in the case. We understood the decision to be that the argument of the British Commissioners in support of their previous conclusions might be adopted by my learned friends as part of their argument, and, to that we had no objection whatever, but here my friend is reading new and additional statements of fact, which are either evidence or else they are utterly totally immaterial. We object to those being considered as a part of the evidence in this case.

Sir Richard Webster. — I only desire to say that I propose to read (in strict accordance with the decision of the Tribunal) this summary of the evidence referred to as obtained by them in 1891, and all the evidence in 1892 (which is in the Counter Case) as a part of my argument. I understood that to be distinctly in accordance with the decision of the Tribunal, but I only wish to say — I am not going to argue the matter at greater length — that if the Tribunal give me the slightest indication —

Mr Phelps. — Might I ask my friend where this statement of Grebnitsky of what he gathered from the Russian cruisers is to be found except there?

Sir Richard Webster. — I think my learned friend, Mr Phelps, while Mr Williams was speaking to him, was not paying attention to me. I stated that that was evidence obtained by the British Commissioners in the year 1891, upon which they made their statement. I did not say that that was in the appendix.

Mr Phelps. — My question was whether the evidence upon which they base this statement is to be found in this case anywhere, or whether

it is supplied in suppor of a statement which we claim to have disputed.

Sir Richard Webster. — It is found in the statement made by the Commissioners themselves.

Lord Hannen. — Where is it to be found?

Sir Richard Webster. — As far as I know it is a statement made by the Commissioners.

Lord Hannen. — Where is that statement to be found?

Sir Richard Webster. — At page 24.

Lord Hannen. — Of the Supplemental Report?

Sir Richard Webster. — Yes.

Mr Carter. — And no where else.

Lord Hannen. — Mr Phelps was trying to ascertain where it appeared upon the record. You say in the Supplemental Report.

Sir Richard Webster. — It did not appear before and the report says so.

Lord Hannen. — It is the only evidence of the statement.

Sir Richard Webster. — The statement appeared that there was intermingling — I will refer to that in a moment.

In the original report the British Commissioners stated that in their opinion the two herds intermingled; they had not stated the evidence and they proceeded to say this :

> In our previous report as the existence of a certain amount of intermingling had never been questioned, it was not considered necessary to note in detail the evidence and the observations upon which the general statements made were based.

Lord Hannen. — Well, you might adopt that into your argument — that that was the reason why they did it. Now what is the next statement?

Sir Richard Webster. — The next statement is this — that they now state what was the information that they had obtained in 1891 upon which they drew their conclusion, they having had no reason to state it before, because rightly or wrongly they did not think this matter would be disputed, and that is, as I understand, (of course I am entirely in the hands of the Tribunal with regard to this matter), a statement by the Commissioners in exactly the same manner as that which was stated in their original report, not of course controlled by rules of evidence any more than the statement of the United States Commissioners, but a statement of evidence they had before them from which they drew their conclusions. The rest of the matter refers to that which is in evidence, What I was reading when Mr Phelps interposed was the statement by the Commissioners of what they learned from Mr Grebnitsky.

Mr Carter. — The position of the learned counsel seems to be this : that if there is any matter of fact in the possession of the British Commissioners at the time they drew their original Report, which matters of fact are not contained in it and which are in the nature of evidence, that they may now introduce that evidence of these matters of fact, and for the reason that they were not then thought to be material. The point is, that it is introducing *new* evidence, and the suggestion that it

was omitted by them at the time, because they did not think it to be material, does not detract from the fact that it is still *new* evidence, and that was excluded by this Tribunal, as we understood, when we debated upon the question of the introduction of this report.

Sir John Thompson. — It was not excluded.

Mr Carter. — It was excluded as evidence, and was allowed to be adopted by way of argument.

Sir John Thompson. — We reserved our decision as to whether it should be received as evidence.

Mr Carter. — At all events it was not admitted.

Sir John Thompson. — It was not received.

Mr Carter. — If the question still remains open, we make objection now.

Lord Hannen. — Were you going to add anything, Sir Richard?

Sir Richard Webster. — I was going to say this. As, of course, this matter is of more importance upon the question of Regulations than it is upon this matter — but for the introduction of it by Mr Coudert I do not know that I should have referred to it — I was going to read the decision of the Tribunal. I am reading now from page 192 of the revised report.

> It is ordered that the document entitled a supplementary Report of the British Behring Sea Commissioners, dated January 31st 1893 and signed by George Baden-Powell and George M. Dawson and delivered to the individual Arbitrators by the Agent of Her Britannic Majesty on the 25th day of March 1893, and which contains a criticism of, or argument upon, the evidence in the documents and papers previously delivered to the Arbitrators, be not now received, with liberty, however, to Counsel to adopt such document, dated January 31st 1893, as part of their oral argument; of they deem proper.
>
> The question as to the admissibility of the documents or any of them, constituting the appendices attached to the said document of January 31st 1893, is reserved for further consideration.

I have not referred at present — I am not going to refer to — any appendices, but solely to the statement made by the Commissioners, gentlemen of repute — as to the grounds upon which they made the statement which I referred to in their original report. I do not like to involve myself in matters of discussion and I submit I am within my right. Of course I have other important matters to bring before the Tribunal, and unless the Tribunal wished to adjourn formally to consider it, I would rather postpone this matter for the present.

The President. — We must reconsider the matter at any rate since you intend to use those statements in your arguments on Regulations.

Sir Richard Webster. — Certainly.

Mr Justice Harlan. — You postpone it until that time, do you?

Sir Richard Webster. — Upon the least intimation from the Tribunal, I should do so.

Lord Hannen. — I am very anxious, Mr Phelps, so far as I can, always to meet your views. Would it be objectionable if Sir Richard referred to

it, you having noted the fact that the evidence was not contained in anything which preceded the supplementary Report? We bearing that in mind, would it inconvenience you that Sir Richard Webster should use it, with the comment made by you upon it?

Mr Phelps. — It is not a question of convenience if the Tribunal please, at all — it is a question of right. The objection that we make is: That neither under this Treaty, nor under the procedure of any Tribunal that ever sat under the forms of law, is it allowable for a party after the case is made up, the written argument complete, the oral argument begun, to come in with a statement of new facts and new evidence that is to be regarded by the Tribunal in determining the issues of fact.

Lord Hannen. — I had that fully in my mind. You have answered by saying you stand on your strict rights, and do not treat it as a matter of convenience.

Mr Phelps. — As a matter of course if it is not to be regarded, it need not be read. If it is to be regarded, we are defenceless as far as that is concerned.

The President. — You object to the facts being stated, because you have not had time or the capacity to control them.

Mr Phelps. — Certainly.

Sir Richard Webster. — Mr Phelps, observation shows that he really has not apprehended my position in the least. In paragraphs 452 and 456 of the original report the British Commissioners state the fact that in their opinion, (rightly or wrongly) they come to the conclusion that there was intermingling.

Mr Justice Harlan. — That there *was?*

Sir Richard Webster. — Yes — intermingling. They did not state the information they had obtained with regard to the matter. They did state an amount of other information they had obtained, and the United States Commissioners in their report equally state that. In this supplementary Report all they do is to give to the Tribunal the information they then had upon which they formed the conclusion which the Tribunal can criticise.

Lord Hannen. — That raises the question of what Mr Phelps insists upon, whether or not it is not fresh evidence.

Sir Richard Webster. — Of course I do not want to argue this again now — this was the whole matter we discussed on the previous occasion. It is not a question of evidence — it is a question of information before the Tribunal with regard to this question, depending partly upon the conclusions people drew from certain facts.

Sir John Thompson. — The British contention at that time only was that this was admissible and capable of being used *quoad* Regulations, and you have not come to that stage of your argument yet.

Sir Richard Webster. — Really, one only regrets possibly that one is involved in a contention which may be thought to introduce questions of ifficulty to a greater extent than it does. I am willing from the point of

view of property argument not to refer to this any more; but I must, in adopting that line, be understood distinctly as reserving my position. I do not pass from it it in consequence of what my learned friend, Mr Phelps, has said in regard to this matter, because he has, with deference, endeavoured to put us in a position that we have never assumed, and which we ought not to be supposed to have taken.

So far as I am concerned, if the Tribunal prefer that the matter should be discussed at a later stage, it does not bear directly on the point I am now arguing. There is abundant evidence without this, before the Tribunal, to enable them to come to the conclusion to which I invite them.

The President. — Then, Sir Richard, you are willing to pass over these facts till you come to Regulations?

Sir Richard Webster. — Certainly, Sir.

The President. — Very well.

Sir Richard Webster. — Then there is one argument to which, for obvious reasons, the Tribunal will not expect me to refer at any length; and that is, the question of the fertilisation of the female at sea. All I desire to say is that I hope they will be good enough to take a note of pages 33 and 34 of the British Counter Case, Appendix 2, where will be found evidence of between 20 and 30 witnesses. The fact, for what it is worth, is abundantly proved. There is this further matter to which I ask the particular attention of the Tribunal, that, upon the evidence on both sides, the United States and ours, there is no evidence of virgin cows ever having been seen on the Island at all, and it has a remarkable bearing on this branch of the case. But, of course, for obvious reasons, I do not desire to elaborate that matter further now; I may have to call attention to it later on.

Sir, Mr Coudert told you that the branding of these pups was a matter of perfect ease, could be done without the slightest difficulty, and that that fact was strong evidence of the property rights of the United States. Mr President, I do not doubt that this Tribunal have read many passages in these affidavits, so that they have a very intimate knowledge of the evidence; and I am willing to put this in the broadest possible way. It has never been done, except in the instance of the hundred seals that had their ears cut in order to see whether they would come back to the same rookeries, with the result, as the Attorney General reminded you, that none came to the same rookery: some were found in different parts of the Island, and some were found on the other Island of St George. When you remember the evidence as to the timidity of these animals, that, if the rookeries are disturbed, the seals go with such haste (this is on the evidence of both sides) to the sea, that they trample over the young pups and kill them, — when you know that the evidence is that, upon any person alarming them, they immediately take to the water and no longer remain upon the land; when you further find that upon the evidence of Mr Stanley Brown for the United States and the evidence of Mr Macoun and other witnesses, to whom later on I shall have

to call attention, the pups in 3 or 4 weeks from their birth spread themselves over miles of these Islands, I think the suggestion made to you that a ground for awarding property is that these seals might be branded is somewhat extravagant. I use, and desire to use, no stronger expression than that.

Now, I would point out that if they were marked or branded, it would make no difference on the question of property. If I mark my pheasants, those actually hatched by me, and reared by me, and fed by me, and they fly out to other people's land, they have a perfect right to shoot them. Suppose I should mark every young rabbit that could be caught in the same way. If a rabbit went out on my neighbour's property, he would have a right to shoot it. The only case, as I endeavoured to point out to the Tribunal on the last occasion, in which property is given in such animals, is when possession is taken; and possession is not taken by marking a wild animal and letting it go.

Sir, some of my learned friends seemed to think, from this point of view, there was some analogy between the seals and the cattle on the plains of America. That was fully dealt with by the Attorney General; but perhaps I may be allowed to remind you that the whole principle upon which the legislation (for it is legislation) has proceeded in the United States, has been that the animals could be rounded up at any time and were, in fact, rounded up from year to year; and, as the Attorney General reminded you, particular provisions as to marks were directed by Statute. I cannot better illustrate my meaning than by referring to an argument made by Senator Morgan when I was arguing this question of property the other day. He said you may not like to call it property; as long as the seal is on the Islands, the United States or the lessees have absolute dominion over them. I should not agree that perhaps "dominion" was the strictly accurate word to express the right or privilege of capturing. But I will accept it for the purpose of the argument. Did anyone ever hear of dominion extending beyond a kingdom; or of dominion extending beyond territory; and if it were a correct analogy to describe whatever power and rights the United States have over the seals while on the Islands or in territorial waters as being dominion, one wants no better illustration for showing that that dominion stops when the animal leaves the Island or the territorial waters and goes out on to the high seas? Therefore, I ask the Tribunal to come to the conclusion that from the point of view of any act which is supposed to be an equivalent of taking possession, no possession has ever been taken; and if in the case put to me the other day, that there is an attempt to take possession by driving the seals, with regard to all the seals that are not captured and killed the attempt fails or is abandoned; but nothing equivalent, either in law or in fact, to the taking of possession in any way occurs.

In this connection, I was asked, or my learned friend the Attorney General was asked, also I think by Senator Morgan with regard to the question of whether there was not some ground for the theory that all

game belonged to the State — belonged in England to the King : and I presume the Senator would endeavour to draw the analogy that it belonged in the United States to the State. Sir, I am not surprised at that question being put; and, although it is of purely academic interest, perhaps I may be allowed in one or two sentences to give my answer in regard to that matter. Under the old Forest Laws, the King had the exclusive privilege of killing game in royal forests. If the game wandered from the forests, anyone had a right to kill them; and, although there were writers, and among them Sir William Blackstone, who expressed the view that the origin of the Game Laws originally was the property in wild animals being vested in the King, the theory was exposed in a very learned note by a lawyer of the name of Christian, — Christian's edition of Blackstone, — and by perhaps the greatest authority on this question, Mr Chitty who wrote on the " Prerogatives of the Crown " in the work to which my learned friend the Attorney General called attention; and it is the fact, that there is no case and no decision which in any way limited, — no instance either criminal or civil in which a party has been sued or prosecuted on behalf of the King for taking game unless he took it within some privileged place. On the contrary, it is laid down that no individual can be indicted at Common Law for stealing animals *feræ naturæ* unless reclaimed; and the books of authority, — I have investigated this matter, I may say, with as much care as I could bestow upon it, — repeat more than once that there are various authorities showing that, if a man drive a stag out of the forest, then he would be liable for having, interfered with the King's forest; but if the stag comes out of the forest upon his own land or territory, he has a right to kill it.

Again, stating it as I have said more than once, referring to the authority of a case in the 11th Coke's Report, the Case of Monopolies, at page 87, everyone on his own land may use them, that is hunting and hawking, at his pleasure, without any restraint to be made unless by Parliament, as appears by certain Statutes that are there cited. I, therefore in deference to a view expressed by a member of the Tribunal, have to state respectfully before this Tribunal, and in that I shall be corrected by those skilled in English Law whom I address, that for years it has been the recognized law of Great Britain, certainly for a century or more, that the King has no greater property in game other than the royal birds, such as swans, and the royal fish, such as sturgeon, than a subject has in respect of game upon his own land.

Now, Mr President, I wish to say a word about the theory that, apart from property, the United States have equally a right of interfering to protect their industry. Sir, when my learned friend, the Attorney General was addressing you upon this matter, you pointed out to him that the argument of my learned friend, Mr Phelps, and the passage from the Argument which he read, was only an argument based upon the assumption that there was no property in the seals. It is to that part of the Case that the observations which I shall now address to the Court are directed.

It is extremely important that I should enforce upon the Tribunal this view, namely, that my learned friend, Mr Carter in his oral argument, Mr Phelps, in his argument to which he has already told you he adheres, and to which he courteously called our attention, and said that we must deal with it by anticipation, both those learned gentlemen assert that their right to protect — to take the steps which they did take in connexion with the British vessels, is independent of any possession, property, or ownership of the seals themselves. At page 136 of the written argument of my learned friend, Mr Phelps, you will find this passage which I have no doubt is in your memory, but I will read it again.

> The case of the United States has thus far proceeded upon the ground of a national property in the seal herd itself. Let it now be assumed, for the purposes of the argument, that no such right of property is to be admitted, and that the seals are to be regarded, outside of territorial waters, as *feræ naturæ* in the full sense of that term. Let them be likened, if that be possible, to the fish whose birthplace and home are in the open sea, and which only approach the shores for the purpose of food at certain seasons, in such numbers as to render the fishing there productive.
>
> The question then remains, whether upon that hypothesis, the industry established and maintained by the United States Government on the Pribilof Islands, in the taking of the seals and the commerce that is based upon it, are open to be destroyed at the pleasure of citizens of Canada, by a method of pursuit outside the ordinary line of territorial jurisdiction, which must result in the extermination of the animals.

And at page 484 of Mr Carter's speech, he in opening his argument on this part of the Case, said : —

> I come now then to the other branch of the question of property namely, the property which the United States asserted in the industry carried on by them on the Pribilof Islands, irrespective of the question whether they have property in the seals or not.

Therefore, for the purpose of that to which I desire to direct the attention of the Tribunal, I am entitled to assume — nay, I must make the assumption made by my learned friends that no property exists, and that they have no claim either to the seals or to the herd apart from the industry. May I state, first my submission of the law in regard to this matter, and then deal in detail to whatever extent I think necessary, without trespassing unduly upon the time of the Tribunal, with the arguments of my learned friend, Mr Phelps, which appear in the written book. Apart, Sir, from a malicious act with the intent of injuring the person who is carrying on an industry, and done by a person who is not doing the act complained of himself for the purpose of his own trade; there is, so far as I know, by the law of no civilized country, no right of interference by the person whose trade is injured. I am putting it as I am sure my learned friends will admit, in the broadest way. I am not endeavouring to obtain any advantage from the fact that what the United States do is entirely done on the Islands and is in territorial waters. I say that whatever industry is carried on, if it be conceded, as for the purpose of this argument it must be conceded, that the

animal itself is not the property of the United States; except in the case of what may be called wanton and malicious acts with the intent of injuring the person carrying on the trade, pursuit, or industry, no civilized country recognizes that any wrong is being done by the person who, in the course of carrying on his own business, interferes with or competes with, or, reduces, the profit earned by the person who makes the complaint.

Sir, it can be tested in a moment, and tested, I submit, almost exhaustively by one test. Can the right of the pelagic sealer depend upon the question of whether or not the industry is being carried on on the Islands? Is it not absolutely fatal to the United States' contention as to their right of interfering with the particular act done by the pelagic sealer, if they are driven to admit that the pelagic sealer could kill the animal if the United States were not carrying on what they call the industry upon the Islands? Sir, legal rights cannot depend on any such contingencies, and to put only for the purpose of enforcing my argument one of the main positions taken by my learned friend, the Attorney General—suppose the trade did not pay; suppose the price of seal-skins in the market is such that the lessees do not care to renew their lease, and suppose that the United States as a Government do not go in for the catching and dressing of seal-skins, my learned friends cannot claim that the pelagic sealers would then be within their right: and therefore their position is this, that the determination of a particular individual to catch animals on land is in itself sufficient to turn an act at sea otherwise lawful into an unlawful act. Sir, I speak with great deference to any authority that my learned friend, Mr Phelps, may cite when he comes to reply. If there are any new authorities, we shall, of course, have the privilege of dealing with them, but in his very learned and elaborate argument, and in the most interesting argument of my learned friend, Mr Carter, there is not a trace of authority for such a proposition as that to which I am now directing attention. It does require authority and does require some principle which one can appreciate in order that it may find favour with such a Tribunal as this.

Now, what is the real ground, so to speak, of my learned friend, Mr Phelps, contention? You will remember, Mr President, that the United States in their Case give a long list of legislation by colonies and other countries, by which legislation certain restrictive measures have been taken with a view to the preservation of animals, or with a view to the prevention of the interference with individuals in their rights of taking animals. And you will remember that every one of those instances was examined by my learned friend, the Attorney General. They had been examined in writing in the Counter Case; and in the Argument, the defect in the United States' assumption in their original Case had been pointed out; notwithstanding that, in the exercise of his discretion, my learned friend Mr Phelps adheres, and told us orally he adhered, to the contention which is put forward in his written Argument, namely, that these authorities show or afford some analogy of the justi-

fication of the United States upon the ground that these protective or defensive measures are supposed to be legitimate.

Now, how is that put forward? I desire to read three paragraphs in order that you may thoroughly appreciate the particular part of the argument to which I am going to address myself this afternoon. The first one is at page 130 of the United States' Counter Case. This is, of course, after the British Case had been seen, and the Argument of the British Case considered.

> The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur-seals in the waters of Behring Sea in violation of the statutes of the United States, and that such seizures were made in accordance with the laws of the United States enacted for the protection of their property interest in the fur-seals which frequent Behring Sea and breed only upon the Pribilof Islands, which Islands are part of the territory of the United States; and that the acts of the crews and owners of these vessels in hunting and catching seals were such as, if permitted, would exterminate the Alaskan seal herd and thereby destroy an article of commerce valuable to all civilized nations.

Sir, to take the Argument of my learned friend, Mr Phelps, from which I will read a passage in a moment, I certainly should have thought that that meant to assert that the United States' Government had got the right of making these laws, so that they would extend over the waters in which the British vessels were actually sealing. But, to be perfectly fair, I think that that would be scarcely just after the very pointed way in which the case is put by my learned friend, Mr Phelps. If you will be good enough to refer to two passages in the United States' Argument, particularly at pages 170 and 171, you will see the way in which my learned friend, Mr Phelps, proposes to avoid the difficulty which would arise if the language of page 130 which I have just read were taken according to its natural meaning.

> An effort is made in the British Counter Case to diminish the force of the various statutes, regulations and decrees above cited, by the suggestions that they only take effect within the municipal jurisdiction of the countries where they are promulgated, and upon the citizens of those countries outside the territorial limits of such jurisdiction. In their strictly legal character as statutes, this is true. No authority need have been produced on that point. But the distinction has already been pointed out, which attends the operation of such enactments for such purposes. Within the territory where they prevail, and upon its subjects, they are binding as statutes, whether reasonable and necessary or not. Without, they become defensive regulations, which if they are reasonable and necessary for the defence of a national interest or right, will be submitted to by other nations, and if not, may be enforced by the Government at its discretion.

If the words

> " will be submitted to by other nations "

meant other nations may assent to them and then they become part of international law so far as those nations are concerned, I could have understood it; but I gathered, and it is really necessary for my learned friend Mr Phelps' argument, that his contention is that the Statute,

though municipal and though operating as a Statute upon the subjects or citizens of the country who owe allegiance to that State, is to be regarded as a defensive Regulation and may be enforced by the Government at its discretion against foreigners.

The same idea, Mr President, is also expressed at an earlier page of Mr Phelps' Argument, namely page 149, where he says :

> Statutes intended for such protection may, therefore, have effect as statutes within the jurisdiction, and as defensive regulations without it, if the Government choose so to enforce them, provided only that such enforcement is necessary for just defence, and that the regulations are reasonable for that purpose.

Now is there any foundation for this theory. I speak to lawyers ; I speak to those members of this Tribunal all of them who of course have a very large experience of the grounds upon which the action of particular nations has been justified from time to time by the representatives of various nations. Now, Mr President, so far as I know, and certainly so far as the instances given by the United States Government are concerned, there is no instance prior to this case in which it has ever been suggested that the writing down of a law on a municipal Statute — book has any effect outside the dominions of that country so far as foreigners are concerned. The cases in which foreigners have been affected by municipal statutes are, without exception, prior to this case, cases in which foreigners had gone within the dominions and broken the law, or were intending to go within the dominions and break the law.

Lord Hannen. — So that you must add " or had immediately before broken the law ".

Sir Richard Webster. — That, of course, my Lord, is a further qualification. I was putting it a little more generally myself. I say that, of the authorities prior to this case, there is no trace of an authority for suggesting that a municipal statute has any operation — in fact I do not want it better admitted than in the language of my learned friend Mr Phelps himself, to use his expression at page 171 : " they have no authority ".

My point is that, prior to the contention on behalf of the United States, there was no suggestion by any writer or by any Judge that a municipal Statute had any operation against foreigners, excepting in the case where the foreigner either had entered the country or the territorial waters, and broken the law there, or was intending to enter those waters or that territory and intending to break the law. In principle it would be indeed strange if international law was otherwise. I know not the actual number of nations in the world that legislate for their subjects now in some form of written legislation. If this theory of my learned friend, Mr Phelps, is correct ; by simply writing down in the Statute-book or whatever may be the form — in the Ukase if that be the expression for Russian legislation, at the present time, or whatever may be the name of the particular form of local municipal legislation which takes effect in a particular country —

writing it down not in a language known to other nations — because it is a mere accident that in this case the two contending countries speak the same language — if this theory be worth anything, all the Russian municipal laws are defensive regulations to be put in force against foreigners upon the high seas, although they have never been communicated to foreigners and although they speak of course by their Statute-book, or by the statute in which it is expressed, simply and solely to the subjects.

My first broad criticism with regard to this contention is that it is inconsistent altogether with the principles that have affected the relations between nations, that the writing down of an enactment in the laws of the country can have any affect upon foreigners who do not intend to do anything, and do not, in fact, do anything within the territorial limits.

Senator Morgan. — Sir Richard, before you read your authority, I would like to know what your position is about this.

Sir Richard Webster. — Certainly, Sir.

Senator Morgan. — In the exceptional cases you speak of, where a nation may exercise its authority beyond its territorial limits, is the authority when exercised the authority of the statute of such nation, or is it the authority of the international law?

Sir Richard Webster. — It is the authority of the statute of the nation. It is the stretching the long arm of the law. I say, Sir, with great deference to the argument on the other side, that the true ground which has been recognized more than once is that either by express consent, or by acquiescence, as you put it the other day — for it may be by acquiescence — nations, sometimes one, sometimes more, have agreed to the arm of the municipal law being stretched in order to prevent a breach of its municipal law.

Senator Morgan. — Then the question would be how far a nation may be tolerated in defending what it conceives to be its rights outside of its territorial limits?

Sir Richard Webster — I say a nation may be tolerated — I am only adopting your langage for the moment —

Senator Morgan. — Certainly.

Sir Richard Webster. — A nation may be tolerated to any extent, if it chooses to say : I am going to make this a matter of war, and I am going to assert that which I can enforce by power.

But I am now dealing with the legal argument of my learned friend, Mr Phelps. I am now dealing with the question which is submitted to you under Question five.

What right of protection had the United States at the time this Treaty was entered into, and at the time that the vessels were seized — what right exists by international law?

If Mr Senator Morgan will let me postpone to the conclusion of my examination of my learned friend's authorities the consideration of the

question that he has more than once hinted at, whether this Tribunal might not have some wider or more general jurisdiction, I would prefer to do so. I do not think I could make my meaning clear with regard to that matter until I have submitted, as accurately as I can, to this Tribunal what our contention is with regard to what I may call the express authorities to which Mr Phelps refers.

Now, Sir, the expression " defensive regulations " occurs very rarely. On page 147 of the United States Argument, quoting from Chancellor Kent, the same edition that I quoted from the other day, pages 30 and 31, this citation is made :

> Considering the great extent of the line of the American coasts, we have a right to claim for fiscal and defensive regulations a liberal extension of —
>
> What ?
>
> maritime jurisdiction.

Well, I think that the meaning appears perfectly plain from that language, taking the extract by itself. Chancellor Kent, dealing with the question, and arguing the question, of the three-mile limit, arguing the question of jurisdiction, properly so called, pointed out that for the purpose of fiscal and what he there calls defensive regulations, there was a fair claim to a liberal extension of maritime jurisdiction. If the passages immediately following that extract, and immediately succeeding it, are read — they amount to some two or three pages — it will be found that in the whole of that extract, in the whole of that discussion, Chancellor Kent was dealing with the right of a nation to make municipal laws which should have an operation beyond the three miles, and never referred to the executive acts of a nation to be justified upon the principles to which you, Senator Morgan, referred me a moment ago; that he had not in his mind, and was not at that time in any way discussing or considering, those executive acts, the responsibility of which a nation will take upon itself, whether they be right or wrong, according to international law. He was discussing the legal question, and the legal question only, to what extent might a claim be fairly made to an extension of the three mile limit? I am going to point out, sir — I had it in my mind to mention it the other day — that this passage shows that similar ideas as have been expressed this morning by Mr Gram, were really in the mind of Chancellor Kent when he was referring in the following words to the character of the waters over which such maritime jurisdiction should be extended :

> It would not appear unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as for instance from Cape Ann to Cape Cod and from Nantucket to Montauk Point, and from that Point, to the Capes of the Delaware, and from the South Cape of Florida to the Mississippi.

Now, sir, Mr Chancellor Kent may have been right or may have been

wrong in the views that he was expressing with regard to claims; but the point of my present observation is, that, so far from that citation being any authority for the contention of Mr Phelps, that the statute might be construed, and was to be construed, as being an executive act, to be put in force at the discretion of the Government, it is the contrary. A contrary inference is to be drawn, a contrary conclusion to be arrived at; because he is referring to the right of a nation to extend its maritime jurisdiction and to make its laws for fiscal and other defensive purposes.

I am led a little, perhaps, out of the line of thought I was pursuing, but still it will not be inconvenient if I at once call the attention of the Tribunal to some cases which lay down this principle distinctly.

Sir, in those authorities of which we have given the Tribunal and my friends prints, there is a judgment of the great Judge, Mr Justice Story, in the case of the " Apollon ", reported in 9th Wheaton, which I crave leave to read to the Tribunal, because it expresses the argument against the contention of Mr Phelps, that these statutes might be regarded as defensive regulations to be put in force when and as a nation likes upon the high seas or anywhere else. For, be it observed that the necessity of my learned friend's argument compels him to contend that this right would extend to going even into other people's territory, if necessary, as a matter of right.

I do not know whether it would be troubling the Tribunal too much to ask them if they would kindly look at the report of the " Apollon. " It is in the printed authorities handed in by the Attorney General. It is the third case, and begins at page five. The paper is headed " Behring Sea : — Authorities on Search, Seizure and Self defence " :

> The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be,

That is the American municipal laws —

> they must always be restricted in construction to places and persons upon whom the Legislature have authority and jurisdiction. In the present case, Spain had an equal authority with the United States over the river St Mary's. The attempt to compel an entry of vessels, destined through those waters to Spanish territories, would be an usurpation of exclusive jurisdiction over all the navigation of the river. If our Government had a right to compel the entry at our Custom-house of a French ship in her transit, the same right existed to compel the entry of a Spanish ship. Such a pretension was never asserted; and it would be an unjust interpretation of our laws to give them a meaning so much at variance with the independence and sovereignty of foreign nations.

Then there is a passage that is not material upon this point. I have the report here.

> But, even supposing for a moment that our laws had required an entry of the 'Apollon ' in her transit, does it follow that the power to arrest her was meant to begiven after she had passed into the exclusive territory of a foreign nation ? We think not. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels

which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the law of nations. The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is saidthat there is a revenue jurisdiction which is distinct from the ordinary maritime jurisdiction over waters within the range of a cannon-shot from our shores. And the provisions in the Collection Act of 1799, which authorize a visitation of vessels within 4 leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory in the exclusive jurisdiction of another Sovereign? Certainly not; for the very terms of theAct confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by other nations, and would be resisted by none with more pertinacity than by the Americans.

I need not read the rest of the judgment. It is equally in my favor but not so pointed. May I ask the Tribunal to consider the enunciation of the law there laid down by a Judge second to none in the history of lawyers of the world, Mr Justice Story.

And it is, Sir, in accordance, so far as my research has enabled me to discover, with every other Judge and writer of authority, namely, that these statutes have only force, and are intended only to operate, against persons who are attempting to break or have broken the municipal law. I do not repeat the qualification which, for the purposes of accuracy, I should have included, which Lord Hannen was good enough to mention a few minutes ago, namely that even in the case of an actual breach of the municipal law, the breach must be recent, the pursuit must be hot. It is sufficient for my purpose to say that the cases in which these municipal statutes have ever been held of any authority at all are cases in which the foreigner is entering or has entered the territorial water with the intention of breaking the law.

Sir, the other correlative proposition may be stated, I believe, with as much clearness and with as much generality. I believe that in the whole history of diplomatic relations, in the whole history of complaints made by States in respect of acts which they thought were contrary to international law, though you will find many justifications on the ground of immediate and pressing danger, on the ground of the sudden emergency in which a nation has been placed, on the ground that they were willing to take the risk, having regard to the pressing danger, on the ground that persons in respect to whom the complaint was made had behaved so immorally and so unjustifiably that their cases ought not to be taken up by the complaining State to which they belonged, there is not a trace of a justification of any one of these acts upon the grounds now put forward by my learned friend Mr Phelps.

Sir, of course it does not in any way weaken his argument, provided it be in accordance with recognized principles, that it should be for the

first time asserted; but when, as I shall have to show you later on, it is in conflict with principles of international law, universally asserted and universally recognized, it is no small argument which my learned friends have to meet, that they are not able to point to a single case in which the action of a State complained of has been justified on the ground that it was carrying out the provisions of municipal statutes which were supposed to speak and intended to speak originally only as regards the nationals over which, of course, they had authority.

Therefore, Sir, though upon an argument based upon the past proceedings of five or six years negotiations between the United States and Great Britain, an argument based upon the fact that in its inception these vessels were seized because they had broken municipal statutes, the men were imprisoned, fined and turned adrift penniless, because they were supposed to be criminals, according to the municipal law of the United States, though in the inception that was the case, it may be said if the right existed, it can now be justified on other grounds. Possibly; but it does form a strong argument for our contention if we are able to point to the fact, that prior to the filing of this written Argument the suggestion that a municipal statute operates against all the world, as an authority which the world is bound to obey upon the ground that the State can enforce it on the high seas at its discretion is an argument which is absolutely new both in point of international law and, so far as I know, according to diplomatic relations.

The Tribunal here adjourned for a short time.

Sir Richard Webster. — Mr President, I mentioned that I had two other cases to which I wished to call attention in this connection, and one is merely to refer to a passage in the United States Argument, page 149, where Mr Phelps having cited the case of the *Queen* v. *Keyn* says :

> The opinion of Chief Justice Marshall, and the language of Lord Cockburn above cited very clearly illustrate the distinction between a municipal statute and a defensive regulation.

If that is merely an expression of Mr Phelps's opinion, I have no right to criticise it, but I must be allowed to say that if it is intended to be a statement that Chief Justice Cockburn ever recognized a municipal statute as being equivalent to a defensive regulation, or that he supported the view that the making of a statute was supposed to be an expression by a nation of an intention to do an executive act which the nation would undertake on its own responsibility, I appeal to the judgment in the *Queen* v. *Keyn*. There is not one word to support that view in the passage read by Mr Carter, which will be found at page 79 of the report which I think the members of the Tribunal have seen in the pamphlet form — the authorized edition.

Chief Justice Cockburn was referring to legislation and to legislation only, and he says in terms :

> Hitherto legislation, so far as relates to foreigners in foreign ships in this part of the sea has been confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and fishery laws, and, under particular circumstances to cases of collision. In the two first, the legislation is altogether irrespective of the three-mile distance, being founded on a totally different principle, namely the right of a State to take all necessary measures for the protection of its territory and rights, and the prevention of any breach of its revenue laws.

And in that passage, cited more than once by my friend Mr Carter, and referred to in this passage in Mr Phelps' argument, it will be found that there is no trace of foundation for the suggestion that the Statute is to be construed as being otherwise than a Statute, convenient, useful, and intended to operate upon, and affect foreigners in the cases in which foreigners have become subject to municipal laws.

Now, Sir, the only other case I need mention in connection with this, is to repeat a criticism which I interlocutorily made with reference to the statement on page 150 of my friend's Argument that the judgment of the Supreme Court of the United States in the case of the " Sayward ", supports this position.

My friend Mr Phelps was good enough to mark for me some five or six pages of the authorized Report from which the Attorney General had read, in which Mr Phelps said would be found the passages which he suggested indicated the view of the United States Courts upon this matter. The passage began at page 13, and ended at page 22. I have read and re-read that passage most carefully, and, speaking of this judgment as a judgment to which the world might look hereafter in investigating the question, I do not hesitate to say that except the suggestion that possibly a Court might not think itself justified in examining an executive act, there is not any passage that supports the view that a Municipal Statute is to be regarded as a defensive regulation. I felt it my duty to repeat this, because Mr Phelps was good enough to shew me the passage upon which he relied. When he comes to reply, I ask the Court to judge between us by listening to any passages from the judgment he may read, and see whether there is any foundation for the suggestion that the United States Courts have ever said, directly or indirectly, that a Municipal Statute would be construed, as against foreigners, as a defensive regulation.

Now, Sir, the next group of authorities cited by my friend Mr Phelps run from pages 152 to 155. They are such cases as. The Amelia Island, the " Caroline ", and the Appalachicola River, and they are either cases of war, or warlike operations. Again I have to observe — I am aware it is repetition, but it is necessary — that this the first occasion when it has been contended that according to International law, there is no distinction between times of war and times of peace. We may be only students — some of us only have the right to speak as students — but I submit the merest student in International law is taught the broad distinction what

are rights in time of peace and belligerent rights, and there is, so far as I know, no warrant for the argument or premise which lies at the root of my friends Mr Phelps' argument, when he states that rights which have hitherto been regarded as belonging only to nations when they are in a state of belligerency are to be exercised as defensive regulations, or as executive acts of defence in time of peace. If that were to be the true view of the matter, a great deal of the learning which has been expended in drawing a distinction between rights of belligerents and rights in time of peace has ben wasted, and thrown away. But I am obliged to deal, and do deal, with this argument, treating it with all the respect I can, but I am desirous of pointing out that from my reading and from my examination of the instances cited, they were, in every case, instances which a nation justified on the ground that it was either putting down a rebellion, or engaged in war, or that the acts it was performing were acts which it was justified in undertaking on the ground that marauders or robbers, were setting up either in the territory or in close proximity of the territory a hostile or marauding band. I need not do more than remind you that is no analogy to the case which we are discussing, assuming I am right the United States have no property in the seal or in the seal herd, and no right to prevent other persons from shooting, catching, or otherwise capturing the seal on the high seas.

Now I come to a part of the case to which very great importance was attached by my friend Mr Phelps. I refer to the passages on pages 155 to 157, on the subject of Newfoundland, and if Mr Phelps' assertions were well founded with reference to Newfoundland he indeed would be able to administer a very serious blow to our contention. He, in effect asserts that Great Britain and Canada have asserted different rights in the Atlantic to those which they are now contending for in the Pacific.

He says on page 157, that

> There cannot be one international law for the Atlantic and another for the Pacific. If the seals may be treated like the fish, as only *feræ naturæ* and not property, if the maintenance of the herd in the Pribilof Islands is only a fishery, how then can the case be distinguished from that of the fisheries of Nova Scotia and Newfoundland.

Mr President, if that argument was worth anything at all it means simply this : that Great Britain (and Canada, representing the rights of Great Britain) have either prevented or claimed to prevent the United States from enjoying the rights of fishing outside the three-mile limit or outside territorial waters in the Atlantic. Sir, I will make good what I am about to say by reference, but I assert that since the year 1783 such a contention has been impossible, and if I choose to go back I say that long before that time the contention had disappeared; but from the year 1783 down to the present time British, French, United States,

and for all I know other nationals — but these are sufficient for my purpose — have been fishing side by side on the banks of Newfoundland 50 or 60 miles from shore, or whatever the distance is, without a shadow of a suggestion that the United States people were there either by grant, by sufferance, by treaty, or in any other way than as exercising the common right of all nations. Mr President, the tribunal will not think that I am attaching undue importance to this incident, when I remind you that at pages 156 and 157, in order to enforce his argument and, if he were well justified, to pour, contempt on the position of Great Britain, Mr Phelps has gone the length of saying:

> It is enough to perceive that it never occurred to the United States Government or its eminent representatives to claim, far less to the British Government to concede, nor to any diplomatist or writer, either in 1783 or 1815 to conceive, that these fisheries, extending far beyond and outside of any limit of territorial jurisdiction over the sea that ever was asserted there or elsewhere, were the general property of mankind, or that a participation in them was a part of the liberty of the open sea.

Sir, I do not wonder that this argument, forcible, strong, and very caustic — indeed much more than an *argumentum ad hominem* — extremely powerful against my contention made an impression on the Tribunal, and accordingly I find on page 745 of the unrevised note — I am not able at present to give the revised page because it is not yet printed — Senator Morgan said this to Sir Charles Russell.

> You made some reference to the Statesmanship of Mr Sumner as being superior to the conception, as I understood you, that there could be any purchase and sale of fisheries in the open sea. That opinion has not always prevailed among the statesmen of the United States, I will say for the reason particularly that in our treaty of peace with Great Britain in 1873 we found it necessary to incorporate in the treaty the following:
>
> It is agreed that the people of the United States shall continue to enjoy unmolested right to take fish of every kind on the Grand Bank and all other banks of Newfoundland, the Gulf of St. Lawrence, and all other places in the sea where the inhabitants of both countries propose to fish.
>
> Of course if we had the open natural right of all mankind to fish in the sea that provision was entirely unnecessary in that treaty it was insisted on and put in.
>
> **The President.** — I believe Senator Morgan it was an allusion to previous treaties with France.

When the real facts are put before the Tribunal it will be seen that, instead of affording as my friend Mr Phelps thought it would afford, an argument in favour of the United States contention it is a most conclusive argument in favour of Great Britain. Sir, what happened was this. In the year 1778 the United States had made a Treaty with France that they would not interefere with the French on the banks of Newfoundland. That was at the time when the United States was struggling for its independence. It was a treaty of friendship and amity, and where having been Treaty rights as between Great Britain and France which excluded the French, the United States rebelling against Great Britain was willing to make terms: and what were the terms?

Senator Morgan. — You mean that Great Britain had made that Treaty — not the United States ?

Sir Richard Webster. — No, the United States while in the course of its rebellion — not with Great Britain, with France.

By Article 10 of the Treaty of 1778 the United States covenanted :

> The United States, their citizens and inhabitants, shall never disturb the subjects of the most Christian King in the enjoyment and exercise of the right of fishery on the banks of Newfoundland ———

that is to say in the Treaty of friendship the United States had agreed that they they would not interfere with the French. In 1775 an attempt had been made by Lord North (and, if I may be permitted to say so in passing, in my mind a most unjust attempt), to restrain and to prevent the inhabitants of New England from fishing on the banks of Newfoundland, they still being, according to the contention of Great Britain, British subjects, and being engaged in rebellion. The war came to end, and the state of things for consideration was : What should be the claims of the United States? I can scarcely but think that there are many in this room who hear me who are well acquainted with the history of those times, but possibly it may not be out of place if I refer to Lyman's Diplomacy of the United States, a work with which many are familiar. In the course of that negotiation in 1783 (which was the Treaty, you remember, recognizing their Independance) the United States' people became aware that France was endeavouring to influence Great Britain, to restrict by Treaty rights, the rights of the United States upon these banks. This will point the observation that was made the other day about the elder Adams saying that he would rather cut off his right hand than let the rights of fishing go.

The President. — You mean fishing on the banks in the open sea?

Sir Richard Webster — In the open sea.

The President. — Not on the Coast?

Sir Richard Webster. — I was not dealing with the coast. I will make an observation upon that in a moment. I am dealing entirely with rights in the open sea. A letter was intercepted and deciphered coming from the then representatives of France to Great Britain, which put the United States upon the alarm, and they imagined that some attempt might be made by Great Britain actually to insist on a restriction of their natural right to fish upon these banks outside. You will find the reference to that incident in connexion with the negotiations of the Treaty at page 124 of the 1st volume of Lyman's Diplomacy of the United States, published, as no doubt the Tribunal know, in the year 1828, and a book from an historical point of view of the highest authority. I might mention only in passing, I shall show it presently, that the fact is that the United States claimed the right of fishing on the Banks as of right as one of the nations. It is a mistake to suppose that she got or claimed those rights by Treaty. The suggestion made a moment or

two ago by Senator Morgan that that was inserted because there was a doubt, is proved not to be the fact. At any rate, from the opinion of Lyman and the perusal of a chapter in his book, he states in the most distinct terms that the United States claimed it as a right, and it was to prevent subsequent interference that that clause was inserted. However, with regard to the incident that led to the first clause, I will just read this passage.

On page 124.

On the side of France, the United States had much more to fear. She was disposed to curtail their fishing rights and privileges, to maintain Spain in her pretensions respecting her boundaries, and to aid England in exacting a compensation for the loyalists.

That means for the people who had been true to the British flag.

A letter written by Mr de Marbois, secretary of the French legation, from Philadelphia, dated March 13th 1782, intercepted and deciphered at the time, if it did not give the first intimation of similar designs in the French Court, strengthened at least the suspicions before entertained. Mr de Marbois advised Mr de Vergennes to cause it to be intimated to the American Ministers his surprise that Newfoundland fisheries have been included in the additional instructions. That the United States set forth pretensions therein, *without paying regard to the king's* (French) *rights*, and without considering the impossibility they are under of making conquests and of keeping what belongs to Great Britain. It will be better to have it declared at an early period to the Americans that their pretensions to the fisheries of the great Bank are not founded and that his Majesty does not mean to support them.

Or, in other words, that the French were at that time endeavouring to get, by means of the Treaty between Great Britain and the United States, a restriction or limit put upon the United States' rights. That put the United States on the *qui vive*; or, rather, if it did not actually put them on the *qui vive*, it increased the suspicions that were then prevalent as to what the attempt might be; and, accordingly, when the Treaty came to be negotiated, and was negotiated, the first part of the third Article was in these terms.

It is agreed that the people of the United States shall continue to enjoy unmolested the right.

I. To take fish of every kind on the Grand Bank and all the other banks of Newfoundland. 2. Also in the Gulf of St Lawrence 3. And all other places in the sea where the inhabitants of both countries used at any time heretofore to fish. And also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland and as British fisherman shall use (but not to dry or cure the same on that island).

Then it says:

"And also on the coast" etc. — giving them coast rights. You will remember, Sir, that quoting from the language of the counsel of the United States, on page 1113 of the unrevised edition, the Attorney General cited the expression:

That explains the reason why it was that the elder Adams said he would

rather cut off his right hand than give up the fisheries at the time the treaty was formed.

You will observe the expression — " give them up ".

Now we come to that which in my submission is most conclusive proof that our contention is right. You will remember that Mr Phelps said it never had occurred to a Diplomatist, — an American Representative or anybody else, — to suggest they had this of right. I think it will be scarcely disputed, even for the purposes of this argument, that war puts an end to Treaties. I suppose I need not cite instances, (of which there are so many that I might almost call them numberless), of particular privileges existing before a war, being put an end to by the war. I need cite no other than this, — that the special privileges given by Clause 3 of Article III with regard to the coast were put an end to by the war of 1812; and, when the United States came to negotiate for fresh privileges under the Treaty of 1818, they acted in accordance with the recognized law of nations.

Lord Hannen. — Was it 1818?

Sir Richard Webster. — 1818 was the date. The actual Treaty of Peace was in 1815; the Treaty of the fisheries was in 1818. When the United States came to negotiate with regard to fresh liberties within the territorial waters, or in other words to get a substitute for that which they only got by the Treaty of 1783, they insisted on getting it by Treaty and they got it by Treaty; but did they either ask or get any fresh grant of the right to fish upon the Grand Banks of Newfoundland, and on all the other banks of Newfoundland? They did nothing of the kind.

The question was never raised or suggested — I will show it in writing in a moment — after 1783, that the United States had that right as a nation. Why, Sir, there was one case in the year 1818. It is referred to at page 91 also of the 2nd volume of Lyman, where a vessel having been seized about six miles off the coast, the British Government repudiated the act — would not have anything to do with it; and it is the fact that diplomatically, openly, and without the slightest reserve Great Britain after 1783, has recognized the right of the United States to fish on those banks — the right as a nation by without regard to any grant by Great Britain. There cannot be a stronger instance or argument in support of my contention in opposition to that of my learned friend Mr Phelps than to point out that if it were true that they got the right of fishing on the Grand Bank by the Treaty of 1783, they would have had to get a renewal of that Treaty after the war of 1812, and not only did they not get it, but never even asked for it. Why not? Because it was openly stated that Great Britain recognized that right to fish as being the right of a nation to fish, quite independently of any grant or right by Treaty. In fact, Mr President, the Treaty of 1783 is an instance by anticipation of what occured in 1824 and 1825; in 1824 and 1825, Russia having made a claim to interfere with rights of navigation in fishing on the

high seas, withdrew those claims and acknowledged they were withdrawn by the first articles of the Treaties of 1824 and 1825. Forty years before, in the year 1783, the United States, fearing that there might be some impediment or claim against their right, got inserted the words in the Treaty that the United States should continue to enjoy unmolested the right. The case is identically parallel.

But now, Sir, I have stated that Great Britain never insisted upon the position that the United States had this right of fishing upon the Banks by virtue of the Treaty of 1783 or otherwise than as a nation. I refer again to the commission which was given to the representatives of Great Britain under date the 28th July 1814 for the purpose of negotiating the Treaty of 1818. It was read by Sir Charles Russell. You will find it at page 1111 of the unrevised Report of the 28th day :

> You will observe that the 3rd Article of the Treaty consists of two distinct branches. The first which relates to the open sea fisheries we consider of permanent obligation, being a recognition of the general right which all nations have to frequent and take fish on the high seas. The latter branch is, on the contrary, considered as a mere conventional arrangement between two States, and as such it has been annulled by the war.

But as my learned friend Mr Phelps says — and he will forgive me, I am sure if for the necessities of my argument I must once more read this extraordinary language :

> It never occured to the United States Government or its eminent representatives to claim, far less to the British Government to concede, either in 1783 or in 1815 that these fisheries were general property.

I do not imagine that those who have prepared the Case of the United States are unacquainted with the book to which I have been making reference. I mean Lyman's Diplomacy of the United States, and it is a little remarkable in the face of what I am now going to read to the Tribunal from that book, that such a statement should have appeared.

You will remember, Mr President, that my learned friend, Sir Charles Russell, read the letter from Lord Bathurst to Mr Adams also from the United States official Papers, and we have the volume here. He read the letter from Lord Bathurst to Mr Adams in 1815 in which he (Lord Bathurst) said, as I have been saying, that Great Britain recognized the right of the United States to enjoy that fishery, as one of the nations of the world. When we called attention to that letter my learned friend, Mr Phelps, was good enough to tell the Tribunal we need not trouble further about the reference because he had the book from which we read, in Court, or in Paris. Sir, that letter from Lord Bathurst to Mr Adams is set out in this book — Lyman's Diplomacy of the United States; and here, at any rate was a diplomatist who knew what was the true state of the matter, and argues, as he is entitled to argue, in this book that the United States always had this fishery as of right, and that the Treaty of 1783 was simply for the purpose of preventing molestation, fearing claims might be set

up, and more than that, that subsequently there was no renewal of that right. I will call your attention to two passages in Lyman's Diplomacy. It sets out the commission to the United States Commissioners to negotiate the Treaty, and the terms of the Commission are given at page 86 of the second volume. They are set out in terms.

I read not from the actual language at full length, but from the text of Mr Lyman;

The most important matter, adjusted at this negotiation, was the fisheries. The position assumed at Ghent, that the fishery rights and liberties were not abrogated by war, was again insisted on, and those portions of the *coast* fisheries, relinquished on this occasion, were renounced by express provision, fully implying that the whole right was not considered a new grant. The American commissioners in 1814 were instructed not to bring that subject into discussion, and the proposition ultimately submitted, securing the rights and liberties, as in the Treaty of 1883, arose from a stipulation, offered by the British commission, respecting the Mississippi, a right invested by the American with the same permanent character, as the fisheries themselves. The English, knowing the slight comparative value of the Mississippi, proposed the two parties should resume their respective rights in consideration, respectively, of a full equivalent; but this proposition was not accepted, for, in the opinion of one party, the right remained entire, and lest it should be impaired by implication, the American commission offered to recognize the right of Great Britain to the navigation, and declined the boundary of the parallel of the 49th degree to the north, (since agreed on) not choosing, even, to accept an implied renunciation on the part of Great Britain to that navigation.

The instructions for the Commissioners in 1818 do not agree precisely with the position, assumed at Ghent, respecting the Mississippi.

Then lower down on the same page.

A certain part of the doctrine, as to the effect of war on the treaty of 1883, is undoubtedly sound, but it appears to us, the remark is equally just, that certain portions of the fishing rights or liberties have, from the commencement of the first negotiation with England, been made the subject of Treaty regulation. These remarks, of course, do not apply to the bank, or deep water fisheries, about which all formal stipulations are needless.

That, Sir, was Mr Lyman's opinion. My learned friends will scarcely deny that he was a diplomatist of eminence, and it will show you, at any rate, that this is no fresh case we are setting up. But, Sir, at page 97 occurs the passage in that letter from Lord Bathurst to Mr Adams, which I respectfully submit is a conclusive answer to this contention put forward by my learned friend, Mr Phelps.

When, therefore, Great Britain, admitting the independence of the United States denies their right to the liberties —

You will remember that the liberties were the inshore rights

it is not that she selects from the treaty articles or parts of articles, and says, at her own will, this stipulation is liable to forfeiture by war, and that it is irrevocable; but the principle of her reasoning is, that such distinctions arise out of the provisions themselves, and are founded on the very nature of the grants. But the rights, acknowledged by the Treaty of 1783, are not only distinguishable from the liberties, conceded by the same Treaty, in the foundation, upon which they stand,

but they are carefully distinguished in the Treaty of 1783 itself. The undersigned begs to call the attention of the American minister to the wording of the 1st and 3rd articles, to which he has often referred for the foundation of his arguments. In the first article, Great Britain acknowledges an independence, already expressly recognized by the powers of Europe and by herself in her consent to enter into the provisional articles of November 1782. In the 3rd article Great Britain acknowledges the *right* of the United States to take fish on the Banks of Newfoundland and other places, from which Great Britain has no right to exclude an independent Nation.

That is the language of Lord Bathurst on behalf of Great Britain in the year 1815. It is a little hard that for the purpose of this case, for the purpose of endeavouring to allege inconsistency on the part of the Representatives of Great Britain, that my learned friend should have, perhaps by inadvertence, thought fit to say in his Case that it never occurred to the Representatives of Great Britain to point out that the Fisheries on the Bank of Newfoundland were enjoyed as of right.

In order to point my observation, I read further from the letter :

But they are to have the *liberty* to cure and dry them in certain unsettled places within his Majesty's territory.

And the next passage refers to those liberties being such as those that were put an end to by the war.

It is surely obvious, that the word *right* is, throughout the treaty, used as applicable to what the United States were to enjoy in virtue of a recognized independence and the word *liberty* to what they were to enjoy as concessions, strictly dependent on the treaty itself.

Sir, I cannot believe that had Mr Senator Morgan in his mind the facts that my learned friend the Attorney General and I have taken entirely from the official documents, from the language of the American Representatives, from the language of the Representatives of Great Britain at the time these matters were under negotiation, that it would have escaped his attention, that the language of the first clause of Article III of the Treaty of 1783 was inserted for the purpose of preventing molestation in respect to a right which the United States' people claimed as of right by virtue of their being recognized as an independent Power, — as one of the nations of the world.

Senator Morgan. — My difficulty, Sir Richard, in making that suggestion was this; why the American people should have apprehended molestation about a matter that Great Britain made no claim to at all.

Sir Richard Webster. — Well, Sir, I have already, I think, answered that; but I may do it again in one summary. It was that they themselves had made a bargain with France, — there had been a claim made by Lord North to exclude them on the ground of being subjects in rebellion, and, therefore, they could be so excluded, and it is a clause inserted against any subsequent interference — in fact just in the same way, Mr Senator, as I have submitted to you, I hope not unsuccessfully, that under the first Articles of the Treaties of 1824 and 1825 between Russia

and the United States, and Russia and Great Britain respectively, neither the United States nor Great Britain got the grant of anything; they merely got the acknowledgment that claims previously made were to be no longer insisted upon by the Nation that had put them forward.

But, Sir, as a matter of fair play, as a matter of common justice, when this is introduced by a statement is there to be one law for the Atlantic and another for the Pacific? what answer is there to the fact to which I invite the attention of my learned friend, Mr Phelps, that from 1783 down to the present time (and that is now more than 100 years) the fishing boats of all countries have been fishing upon the Banks of Newfoundland outside the territorial waters without the slightest attempt on the part of the Government of Great Britain to interfere either with France, or with the United States, or with anyone else; and the suggestion is entirely unfounded that we are seeking here to claim from this Tribunal a right in respect to the seals of the Pacific which we have not conceded to the United States in respect to the cod of the Atlantic. Surely, Sir, if there is to be reasonable appreciation, as there must and will be, of the arguments used on the part of Great Britain, it will remain for the United States' advocates not to re-assert a statement which at present is unsupported by any authority, but to give me the date, the place and the person when, where, and by whom, the assertion of the right to exclude the United States from the enjoyment of such national rights has been asserted by Great Britain. Certainly, in connection with the very caustic observation inserted at pages 153 and 157, it is for my friends to deal with the facts as I have now placed them before this Tribunal; I have based my statement, as you are aware, not on my imagination but upon documents which stand upon record and have stood upon record for the last 50 or 60 years, nay even a longer period than that.

Sir, the next branch of my learned friend Mr Phelps' argument is that which we find on page 158. It includes a passing allusion to the law of piracy, which might, I think, have been well left out of the present consideration. But I suppose I must regard this as serious as it was inserted with consideration and is to be adhered to. Calling attention, or arguing, rather, upon the question of the right of self-defence, the sealers are practically compared to pirates, — nay more, piracy is rather held up as being a pursuit to be practised, and to be approved of in comparison with pelagic sealing.

This is no exaggeration, Mr President. At page 158 occurs this language speaking of piracy: "The reason of this well settled rule is not found in the character of the crime which is but robbery and murder at worst." How much further do they wish to go? "*Robbery and murder at worst*"! I want to know what other crimes there are? "but in the necessity of general defence". This is the first time, Sir, in the history of argument on international law that I ever heard that the right to capture and to string up and to shoot pirates was a necessity of general defence, — if that means the defence of a nation in respect of its rights. Sir, writer

after writer, Judge after Judge, has justified the law which applies in the case of pirates, on the ground that they are " *hostes humani generis* ", that is to say that they rob persons and outrage all rules of property and morality, and, therefore, quite apart from the defence of a particular nation they are to be punished when caught red-handed by whom caught, or may be taken into any Tribunal of any country and there dealt with. Sir, my learned friends must have been a little bit in a difficulty to find a justification for this application of the law when they said that the reason for this well settled rule is not found in the character of the crime which is but robbery and murder at worst, meaning thereby I presume that the shooting of seals at sea is worse than robbery and even worse than murder.

But this is not Mr Phelps alone.

Mr Phelps. — It is certainly not me. I said no such thing.

Lord Hannen. — No.

Sir Richard Webster. — I assure you I am only too glad to take any correction but if my learned friend will permit me to call attention to page 214 there it is in black and white signed by the distinguished name of Mr Carter. This is of the pelagic sealer alone :

> To prevent and punish it is as distinctly the duty of all civilized nations as it is to prevent and punish the crime of piracy. The pelagic sealer is *hostis humani generis*, just as the pirate is, thought with a less measure of enormity and horror.

Lord Hannen. — There it is a " less measure ".

Sir Richard Webster. — Well, I will construe that in the sense that Mr Carter desired to say there is a less measure; but the principle that Mr Carter is advocating there is distinct. Surely I am not saying that which is unnecessary when I point out that the argument of the United States drives them into this position, that unless they can establish to your satisfaction that pelagic sealing is to be placed in the category of piracy, half — nay, more than half, practically the whole of their authorities are cut away. Sir, what is the idea of this comparison of piracy? I do not know whether the Tribunal remembers it Of course, it has a ludicrous side for this Tribunal, but there was nothing ludicrous in the Court of Alaska when those poor captains and sailors were before the Judge and were told that they were pirates and it was said that they were to be treated as pirates.

Lord Hannen. — They were told that they were to be treated as having violated the municipal law.

Sir Richard Webster. — I am speaking of that which was said of them by the Judge. I am not in any way suggesting that the United States would willingly for a moment use language to these men in that respect, but all I mean is, that in order to strengthen this case, the United States people have found it necessary to endeavour to bring pelagic sealing within the category of piracy, and why? My Lord as well as the other members of the Tribunal will remember that over and over again, Lord

Stowell, Mr Justice Story and Chief Justice Marshall have said that the only case in which they knew that in time of peace the right of search of vessels existed, was in the case of piracy.

The one case in which it is admitted that a right, which may be said to be a belligerent right under ordinary circumstances, did exist in time of peace was in case of Piracy. The passage was read by the Attorney General; it was said by Lord Stowell in the case of the "*Le Louis*" reported in the 2nd Dodson, and cited in the United States' Argument at page 160, and also cited in support of the existence of the right of search, at the bottom of the page.

> Upon the same principle has been maintained the right of visitation and search, as against every private vessel on the high seas, by the armed ships of any other nationality. Though this vexatious and injurious claim has been much questioned, it is firmly established in time of war, at least, as against all neutrals. Says Sir William Scott, in the case of *le Louis* (2 Dodson, page 244) : This right (of search) incommodious as its exercise may occasionally be, has been fully established in the legal practice of nations, having for its foundation the necessities of self-defence.

Yes; but what, in that Judgment, does he say at pages 244 and 245? He says :

Except against pirates, no right of visitation and search exists on the high seas save on the belligerent claim.

Now, you will see why it was necessary for the argument of Mr Phelps, and also that of Mr Carter, to endeavour to get the Tribunal to accept the view that pelagic sealers were to be regarded and treated in the light of pirates by this Tribunal. I accept the correction of Lord Hannen, which is a correction I ought not to overlook; namely, that it is not just to say that they were ever charged in fact in the United States' Court with any other offence than that of breaking the municipal Statute; but my observations were directed, not to the formal proceedings, but to the attempt that has been made to colour this act for the purpose of the case now presented to this Tribunal.

Now, the next line of argument adopted by my learned friend Mr Phelps is based on the laws of quarantine referred to at page 159. I have said that the rules of evidence are lax enough, and all kinds of evidence have been introduced by both sides; I draw no distinction between the two parties in this respect, — hearsay, opinion, and all classes of evidence have been introduced; but, when it is suggested by my learned friend in his Argument that the Quarantine Laws have been used to interfere, or are intended to interfere with vessels upon the high seas, it is not asking too much to say, "Will you be good enough to tell the Tribunal by what nation and at what time any attempt to interfere with vessels, passing through the high seas, under the Quarantine Laws has ever been known or has ever been made?"

Mr President, what is quarantine? Quarantine is a local municipal regulation; that, when a vessel is coming to your ports and to your har-

bours from an infected place, she should not be allowed to come into your ports without a clean bill of health. If she has not got a clean bill of health, she has to be put into a certain position and be disinfected for a certain time. Now, where is the quarantine performed? Everybody acquainted with these matters knows that the quarantine is performed in the country where the vessel intends to unload its cargo or disembark its passengers.

The Attorney General, put a case to the Court; and I should wish to enforce it. Take a vessel bound to France, Germany, or Belgium or Russia passing through the English Channel. Has anyone ever heard of an attempt by Great Britain to stop such a vessel and say she is to be subjected to penalties because of the quarantine laws? The mere statement of the case, I submit, is conclusive. When a ship is going or a person is going to visit a territory, it is a part of the prerogative right of the Crown, and I suppose in the United States of the President, but I will not venture on surmise in that matter, but someone has the power, to make laws or lay down rules under which foreigners shall visit the country. We, by our legislation, of course, prescribe the conditions under which foreign ships shall visit our shores, and among them are the Quarantine Acts.

We have told you and I am permitted to say it with the authority of the Public Department for which I have no longer the right to speak, but my learned friend the Attorney General has, that such an instance in Great Britain is unheard of, that no attempt has been made, or could be made; and on principle as I have said, when you remember the process called Quarantine is to be done in the country which the ship is going to visit, it is obvious it can have no application quite apart from the terms of the Municipal Act to vessels merely passing through the high seas. When these Acts were under consideration by the Court of Queen's Bench in that judgment so often relied upon by my learned friend, Mr Carter the *Queen* v. *Keyn* the true ground of the Quarantine Acts was considered. They are put by Lord Chief Justice Cockburn at page 89:

> I am further of opinion that Parliament has a perfect right to say to foreign ships that they shall not, without complying with British law, enter into British ports, and that if they do enter they shall be subject to penalties unless they have previously complied with the requisitions ordained by the British Parliament; whether those requisitions be, as in former times, certificates of origin, or clearances of any description from a foreign port, or clean bills of health, or the taking on board a pilot at any place in or out of British jurisdiction before entering British waters. Whether the Parliament has so legislated is now the question to be considered.

Therefore, Mr President, I ask the Tribunal in considering the argument I have addressed to you on this matter, to say there is absolutely no analogy; it falls within the principle I enunciated beforethe adjournment to day that these laws are intended to operate and to have effect only on vessels coming to our own country and to our own ports and

upon our own vessels; those were the words used by Mr Justice Story in the case of the " Apollon " which will be found reported in the 9th Wheaton.

Then Mr Phelps at pages 160 to 163 asserts in his argument that Great Britain has claimed the right of search in time of peace. I am going to make but one observation with regard to that matter. We were of course surprised when we found the reference made to the letter of Lord Aberdeen. We sent for that letter and the Tribunal have now before it the original letter of Lord Aberdeen, the contemporaneous letter of Mr Stevenson who represented the United States speaking of the year 1841, and again we have the debate and diplomatic correspondence in the years 1858 and 1859.

The result of that being that so far from it being true that Great Britain had never abandoned, if she ever claimed, but still insists upon this right of search in time of peace, the very document referred to by my learned friend in his argument contains the most complete and absolute refutation of the argument put into the mouth of Great Britain on behalf of the United States.

Sir, I believe that, without, of course, pretending to say that I have covered the ground in the same way upon this part of the case as my learned friend the Attorney-General did, I believe that I have noted all the heads of argument on the question of protection which have been cited by Mr Phelps in support of his view. And I come back to that principle upon which, and by which in my submission to this Tribunal, this case must be determined, so far as this matter is concerned. If the United States have got the right of property in the seals or in the seal herd, that property does not cease when those seals leave the territorial waters of Behring Sea; and I should admit that from the point of view of what may be called defence in that sense—that if the United States, or the representative of the lessees could say to the pelagic sealer a thousand miles south of the Pribilof Islands, or in the Gulf of Alaska, or away to the west of those islands of which I gave the name this morning, " That seal which you are going to shoot is mine, you must not shoot it ", he would be allowed to take measures, not to break the peace, but to take measures to prevent the seal being shot, and in a municipal court, if the man who had shot the seal came into the jurisdiction, so that he could be sued, might have the right to bring what we call an action of trover or an action for the value of the seal.

Senator Morgan. — Or if the ship was brought into the Prize Court, they could proceed against the ship?

Sir Richard Webster. — No I have never heard of such a thing a sa proceeding in a Prize Court because a piece of property was taken except in time of war. It is foreign to the whole principle of our of jurisdiction. There is no relation, forgive me for a moment if I enlarge upon it—there is no relation between the offence and the punishment.

Senator Morgan. — I do not understand, Sir Richard, that the juris-

diction of a Prize Court depends upon the fact that there is an existing state of war.

Sir Richard Webster. — There must be either a .isting state of war or an arrangement by treaty between the parties.

Senator Morgan. — I think not.

Sir Richard Webster. — Well Sir, I speak subject to correction. I am aware of the slave trade conventions, whereby vessels were allowed to be taken in and condemned as between two nations.

Lord Hannen. — The prize court is usually assigned to the admiralty court; but I never heard of a prize court except in relation to war. I never heard of such a thing.

Senator Morgan. — What becomes of the cases of the violations of the customs laws? smuggling?

Sir Richard Webster. — With great deference to Senator Morgan, they would not be enforced in a prize court at all. They would be enforced in a municipal court to which jurisdiction was given by statute.

Senator Morgan. — Prize jurisdiction.

Sir Richard Webster. — I beg your pardon.

Senator Morgan. — Jurisdiction to condemn a prize by capture and confiscation.

Sir Richard Webster. — I beg your pardon, Sir. I say with the greatest respect that there is not a vestige of authority that a prize court would be necessary in order to put into force a breach of municipal statute.

Senator Morgan. — I do not mean it is necessary; but it occurs to me that it is the subject of such jurisdiction; that the municipal statutes can confer that power upon the prize court.

Lord Hannen. — Of course a court may have that p wer, but by the municipal law it would have powers analogous to those which are exercised by a prize court.

Senator Morgan. — That is exactly the power conferred by Act of Congress upon the courts of the United States.

Lord Hannen. — That may be; but a prize court is something, so far as my knowledge goes, which has only relation to a state of war.

Sir Richard Webster. — By the law of both countries.

Senator Morgan. — That seems a national view of it; but every State has the right to give to its courts such jurisdiction. A prize court is a municipal court, and depends for its jurisdiction upon municipal law. It derives its jurisdiction under the municipal law.

Sir Richard Webster. — It is a confusion of terms :

Senator Morgan. — I will hear you, with pleasure.

Sir Richard Webster. — With great deference, it is a confusion of terms.

Senator Morgan. — I think not.

Sir Richard Webster. — Suppose a statute passed against smuggling, — we will take the case of a law, first, if you please — that brandy shall be subject

to a duty of $ 5 a gallon. Any person who smuggles brandy shall be liable to a penalty of $ 100 and the ship, just the same as, according to our law, the ship can be seized and confiscated.

Senator Morgan. — The ship commits the offence.

Sir Richard Webster. — If you like. It is immaterial to my purpose. The man commits the offence, but his ship is supposed to do it.

Senator Morgan. — The offence is attributed to the ship.

Sir Richard Webster. — The ship comes in : is seized by a custom-house office : is libelled — which is the expression formerly used in the old courts—is libelled and condemned. That court does not act as a prize court in doing that. I will go further ; — there is no foundation for the suggestion that in exercising that jurisdiction the court would be a prize court. It may very likely be that you have said to that court " If a prize case arises you shall have prize jurisdiction. " We were told by Mr Phelps, and I will take it from him — I do not think the statute has been produced by which these Alaskan courts have prize jurisdiction, so far as the municipal laws can give it. I have not seen the statute, and. I cannot therefore express my own opinion upon it, but that would not make them prize courts when they condemn a ship for smuggling; and no lawyer would say for a moment that when the schooner " San Diego " belonging to San Francisco was condemned in the Port of Alaska for a breach of the revenue laws it was condemned in a prize court. Under this same statute, section 1954 actually applies the laws with regard to customs, commerce and navigation, and gives this court jurisdiction in respect of breaches of those laws.

Sir, but I will ask my learned friends if they are going to say that the Alaskan court, condemning an American schooner for a breach of the revenue laws — the very case you put — for running brandy on the coast of Alaska, was sitting as a prize court, I will ask them for their authority.

Senator Morgan. — You will find it in the statutes, Sir Richard.

Sir Richard Webster. — I should like to see the section of the statute that gives them that jurisdiction as a prize court, it is an offence against municipal law. The municipal law provides a penalty and the forfeiture of the ship.

An American ship having smuggled goods into the port of Alaska, she is libelled ; she is sold ; the captain is fined. There is not a vestige of an authority for the suggestion that that is the act of a prize court.

Senator Morgan. — Except that authority which is given by the statutes of the United States, which authorize the courts to proceed as in cases of prize for the condemnation of smugglers.

Sir Richard Webster. — I have not yet seen such a statute. It is not in the statute set out in the United States appendix.

Lord Hannen. — Mr Phelps, for convenience, could you refer us to that statute conferring what we will call prize jurisdiction upon the local courts of Alaska?

Mr Phelps. — I will have it looked up, Sir, and present it to the Court.

Sir Richard Webster. — I am much obliged to Lord Hannen for putting that question. I had ventured to say that the statute set out in the Appendix did not contain such authority.

Senator Morgan. — If you will allow me, I will state my proposition in regard to that.

Sir Richard Webster. — All I desire to say is that the United States printed for our information in volume one of the Appendix to the Case, pages 92, 99, the statutes applicable to this case, applicable to the seizure of these vessels, giving the Alaskan Court jurisdiction, and permitting the proceedings to be taken.

Senator Morgan. — I do not know that I am responsible for the attitude in which this question may have been presented to the slightest degree. The counsel certainly would not like it that I should be held responsible.

Sir Richard Webster. — I do not know that, sir. They might do worse.

Senator Morgan. — But I understand the law to be this in regard to prize courts. They derive their jurisdiction from the municipal law. There is, however, a sort of jurisdiction which comes to them from the very ancient usages under the international law, which, when they are called prize courts, may enlarge the purview of their authority and power; but no nation, as I understand it, can establish a prize court within the bosom of another nation.

Sir Richard Webster. — Except by treaty.

Senator Morgan. — I mean by its own authority.

Sir Richard Webster. — Quite right.

Senator Morgan. — And therefore the power of a nation to organize and to confer authority upon its prize courts must be a municipal power in its authority, in its rules; and whatever is done within it is according to what the usages, customs and decisions of that prize court, subject to the appellate authorities over it, may consider to be proper.

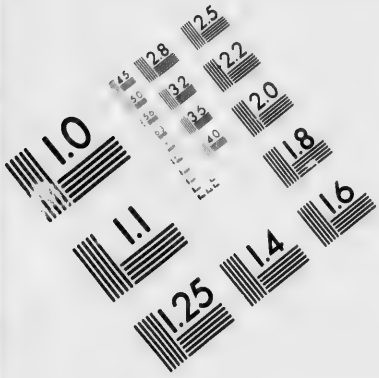
Sir Richard Webster. — I believe, Sir, that the true view is that the prize court, constituted by municipal law, has to administer international law. I do not, of course, want to appear to be arguing this matter.

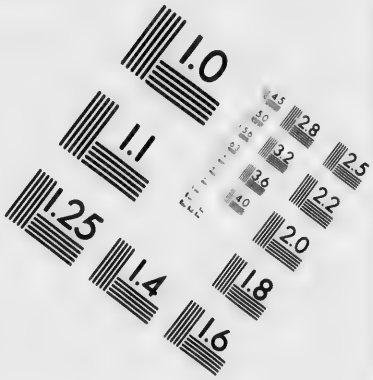
Senator Morgan. — I have advanced nothing in the nature of advocacy. I have a right to ask your opinion upon any question you are discussing.

Sir Richard Webster. — Certainly; but I beg to remind you that you were not responsible for the way in which it was framed by my friends.

Senator Morgan. — I am not.

Sir Richard Webster. — Let me put two or three cases which are perfectly well known to the Tribunal. They know what maritime lien is and a condemnation of a ship *in rem*; a ship comes into port. She is arrested for salvage, or she is arrested for a collision, and she is sold.





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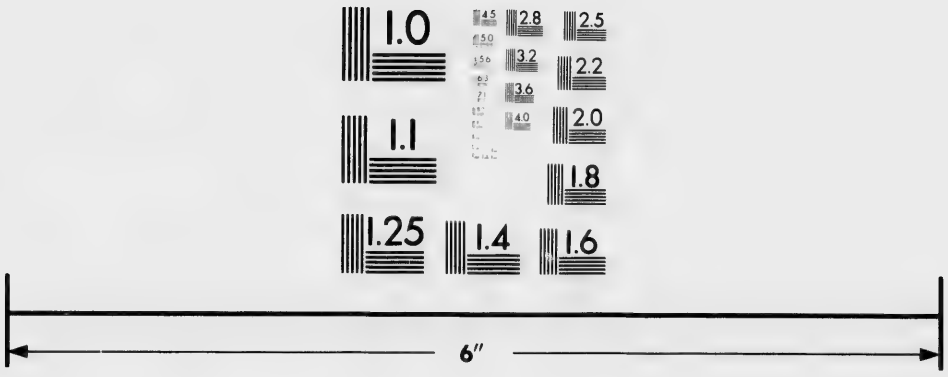

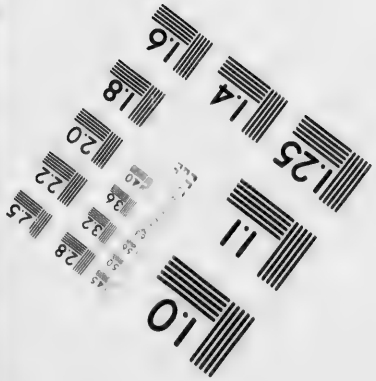

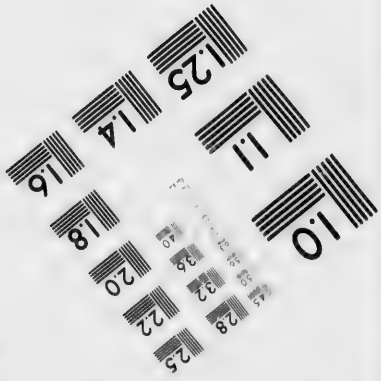

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Senator Morgan. — You mean a vessel brought into port.

Sir Richard Webster. — No. An American ship comes into the ports of Great Britain. She is libelled in the admiralty court in the case of collision, and the damage is so great that it is more than her value. She is condemned and sold by the Marshal of the court. You would not say, Sir, that that court was sitting as a prize court.

Senator Morgan. — I would not.

Sir Richard Webster. — The fact that there is condemnation and sale, or condemnation of the vessel, does not make it a prize court; and if there is any thing in this point, or rather in the suggestion that you have been good enough to put to me, it would equally apply to the condemnations *in rem* in our courts.

Senator Morgan. — If you will allow me, in the case you suggest of a collision, there is a private wrong to be redressed by the action of a court of admiralty. In the courts of prize jurisdiction there is a public wrong to be redressed through the agency of what are termed prize courts.

Sir Richard Webster. — My next observation would have met that. The most common case for condemnation for revenue is for smuggling. An information is filed in the name of the Attorney-General on behalf of Her Majesty, the Queen. I do not know what the corresponding procedure is in the United States, but I should rather suppose that some public officer has the right of suing for the penalty, or taking proceedings for the penalty, in his own name, against the ship, or against the owner, as the case may be. That vessel is condemned and sold for a breach of the revenue laws. I say no man who has ever considered that matter would consider that that court was acting as a prize court.

Senator Morgan. — That depends on the nature of the statute under which the court was acting.

Sir Richard Webster. — I am entitled to say, where is the statute which suggests it was a prize jurisdiction? I appeal to Mr Justice Harlan. It is so foreign to anything that is in these statutes that it is impossible for an English lawyer, at any rate, to understand how such a question could have been raised. The court may have a prize jurisdiction. The court may have an admiralty jurisdiction. For all I know, it might have a small debt jurisdiction. It may have a divorce jurisdiction. It may have a chancery jurisdiction, or any number of jurisdictions. But because it has got the jurisdiction, it does not make it act as a divorce court when it is trying maritime cases, or as a probate court when it is trying divorce cases. And so in the same way, the fact that a ship is condemned under this statute does not make that court a prize court; and to those who advocate this theory, I whould place my learned friends Mr Carter and Mr Phelps, in this dilemma —

Mr Phelps. — What theory do you understand us to argue?

Sir Richard Webster. — I was only assuming for the moment that you would argue the theory submitted by the learned Senator. That is all,

Mr Phelps. I will say nothing more than that; and you will not think it wrong, I am sure, to put it in this way.

Mr Phelps. — Not at all.

The President. — I hope you will not understand the opinion of an Arbitrator, whoever he may be, and whatever may be his nationality, to be on the side of any of the parties here.

Sir Richard Webster. — I think you misunderstood me, Mr President. I am doing nothing, with great deference, either irregular or improper.

The President. — I do not mean to say you are doing anything improper.

Sir Richard Webster. — I am assuming that Mr Phelps contends that the court of Alaska is to be presumed to act as a prize court in condemning these vessels. I am assuming that my first question would be, if an American ship is condemned because engaged in shooting seals in the waters of Behring Sea, by the Court of Alaska, will my learned friend contend before this Court, and assume the responsibility for the advocacy of this position, that that Court was acting as a prize Court?

Mr Phelps. — It may possibly help my learned friend if I say in a word that I conceive that no question whatever in regard to the validity of those seizures, and no question whatever in respect of the right of the United States to seize any vessel hereafter, is submitted under this Treaty to the Tribunal, so far as I am concerned.

Sir Richard Webster. — Of course, in one sense, it relieves me, but it is in no sense any assistance to the particular point that was under discussion. To say that my learned friend does not agree that any such matter is submitted to the Tribunal, is one thing. That is not the point. The point is whether the view which was submitted for my consideration by a member of the Court, that the Alaskan tribunal is to be assumed to be acting as a prize court, is correct.

The President. — I believe one of our colleagues put an inquiry to you in order to elucidate the matter, for the advantage and profit of the Arbitrators, of whatever nationality they be, and not at all to interfere with the pleading of the case, and not to take the point of view of one of the parties.

Sir Richard Webster. — I was not suggesting the contrary for a moment. I was merely saying that if it was part of my learned friends' argument to contend that the Alaskan Court sat as a prize Court, I should immediately ask to be told the statute of the United States which makes the killing of a seal in the high seas of Alaska an offence cognizable in a prize court, and to be adjudicated upon by a prize court?

The President. — You are relieved of that by the answer of Mr Phelps.

Sir Richard Webster. — I should doubt it, Mr President.

The President. — But perhaps you wish to put your own case and advocate your own views.

Sir Richard Webster. — I have not made my meaning clear to you,

Mr President. Many days ago, when the question arose about these courts having a prize jurisdiction, Mr Phelps was good enough to interpose and say that the Alaskan courts had got prize jurisdiction by statute, and it was with reference to that that Lord Hannen put the question to him but a few moments ago, could he, without inconvenience, tell us where this statute giving prize jurisdiction was to be found. But I am entitled, Mr President, to press upon the Court that the only condemnation possible is the condemnation under municipal law, and that if it be condemnation under municipal law, that that will not be cognizable by a prize court, and that if it be an offence under municipal law, then it cannot, for the reasons which I have already given to you this afternoon be extended to the high seas; and further, that on the broadest view of a municipal statute, it can only be put in force against a vessel which either has recently broken the law within the territorial limits, or is intending to go and break the law within territorial limits. Not one of those arguments would apply to the case if we were dealing with a prize court.

Senator Morgan. — I understood you to say, Sir Richard, that a prize court could have no jurisdiction except in a case of belligerency.

Sir Richard Webster. — As a prize court.

Senator Morgan. — I am speaking now of the power of a Government to confer upon its courts prize jurisdiction in any other cases than in case of war.

Sir Richard Webster. — One must be accurate in one's terms. If you mean confer upon its prize courts jurisdiction to act sometimes as prize courts, sometimes to administer the revenue laws, and sometimes to administer the laws of admiralty and divorce, of course the Government have got the power to do it.

Senator Morgan. — Except as to the question of divorce. That is exactly a description of the jurisdiction of the United States District Court.

Sir Richard Webster. — But, Mr Senator, that does not make the court act as a prize court when it is adjudicating between plaintiff and defendant in a small debt.

Senator Morgan. — If the statute says so, that does make it act in that way.

Sir Richard Webster. — That, of course, is an assertion. I must not meet it by counter assertion. I should have thought it extremely doubtful that in that case as against another nation it could make it a prize court. I should be very glad indeed, now that this case has assumed sufficient importance to be put to me by a member of the Tribunal, if my learned friends would supply me with the statutes which support the view that the court is to sit as a prize court when it is condemning a person for having shot a seal under section 1956, or under section 1954.

If you would kindly look at page 95 of the statutes which have been set out, " the laws of the United States relating to customs, commerce and navigation are extended to and over all the mainland, islands and

territory "; and I will assume that among the laws or customs is a prohibition against smuggling, and I will assume that the American ship has been caught smuggling and is condemned, just like a vessel in Great Britain caught smuggling is condemned by the Exchequer Division, it used to be in old days, on the Revenue side of the Court of Exchequer, but now by proceedings upon what is called the Crown side of the High Court of Justice.

Lord Hannen. — We will assume for a moment that there is such a thing — we shall have proof of it if it exists — a court established and called a prize court, and that it should be said that it should have all the powers of the prize court; and amongst the rest that it should have the power of seizing any vessel which was engaged in the slave trade. Still, it would not be a prize court, in that sense. It would have effect against the subjects of that nation, but no against other nations.

Sir Richard Webster. — That is my respectful contention, my Lord, in answer to the learned Senator; but of course, in my point of view, if one can put a case *a fortiori*, the case is so much stronger because the statutes of the United States which are set out, as we have seen, do not purport anything of the kind. The statutes simply purport to give an ordinary municipal court municipal jurisdiction.

Perhaps I might conclude, Mr President, by giving an instance. Supposing that the law of United States provides that every coasting vessel shall have a certain number of cubic feet of space for the crew to sleep in, or a certain amount of lime juice put on board, or a certain amount of medicine for the crew, with a penalty for not doing it, confiscation, if you like. It would be a strong thing to say that because the court had jurisdiction in prize cases, when it was condemning that ship for a breach of the laws of navigation, it sat as a prize court. The learned Senator will, I am sure, understand that I only desire to grasp his meaning; and desiring to grasp his meaning, I cannot see the slightest ground for coming to the conclusion that there is any justification for saying that when any vessel is taken into a court and condemned by that statute, the court that condemned it was sitting as a prize court.

Sir, I have all but concluded. If you will permit me a short time to-morrow morning, I will try to sum up and deal with the point I said I should deal with, in reference to the jurisdiction of this Tribunal.

The Tribunal thereupon adjourned until Wednesday, June 7, 1893, at 11.30 o'clock A. M.

Sir Richard Webster. — Mr President, I shall compress in to a very small compass the remaining observations that I desire to address to the Tribunal. There is one matter to which I should not have made further reference, except for an observation of my learned friend Mr Phelps. If you will kindly look at page 1402 of yesterday's Report, the statement made by Mr Phelps in the middle of the discussion which I will call the "Prize Court" discussion, which was perhaps not very close to my present purpose, is this : —

> I conceive that no question whatever in regard to the validity of those seizures, no question whatever in respect to the right of the United States to seize any vessel hereafter is submitted under this Treaty to the Tribunal, so far as I am concerned.

Well, it surprised us all very much at the time, and it led me to look back and search my memory and again to examine my notes with reference to the United States' contention; and it does occur to me to say to you, Sir, and to ask your consideration of the question why are we here if that was the real position taken up by the United States? The only way in which they have attempted to exercise jurisdiction in the Behring Sea has been by seizing the sealers' ships and by imprisoning these sealers themselves under the municipal law. But do not let it be put in any words of mine; let it be taken from the Case submitted to this Tribunal after most careful consideration by the United States, — both in the Case and Counter Case; and I shall ask the Tribunal to be good enough to refer to the pages as I read them. At page 301 the United States' Case occurs this passage, after dealing with property.

[I should mention they have enumerated on pages 295 to 299 their specific findings, or what they suggest should be the findings with regard to the various questions. I need not go over those, because they are the same points to which I have been referring.]

> The United States Government defers argument in support of the propositions above announced until a later stage of these proceedings.
>
> In respect to the jurisdiction conferred by the Treaty, it conceives it to be within the province of this high Tribunal to sanction by its decision any course of executive conduct in respect to the subject in dispute, which either nation, in the judgment of this Tribunal, he deemed justified in adopting, under the circumstances of the case.

And at the bottom of the page :

> In conclusion, the United States invoke the judgment of this High Tribunal to the effect.

First, as to the exercise of right by Russia. Second, that Great Britain had not objected. Third, that the body of water now known as Behring Sea was not included in the phrase " Pacific Ocean ". Fourth, that all the rights of Russia passed to the United States.

Then I read the actual words.

That the United States have such a property and interest in the Alaskan seal herd as to justify the employment by that nation, upon the high seas, of such means as are reasonably necessary to prevent the destruction of such herd, and to secure the possession and benefit of the same to the United States; and that all the acts and proceedings of the United States done and had for the purpose of protecting such property and interest were justifiable and stand justified.

And upon that the United States invoke the Judgment, as they themselves say, of this High Tribunal.

Now I turn to the Counter Case to see whether that position is in any way abandoned and I will ask the Tribunal to be good enough to look at pages 130 and 135 of the Counter Case.

" Reasons why seizures made.

The United States charge that each and all of the vessels when so seized were engaged in the hunting of fur seals in the waters of Behring Sea in violation of the Statutes of the United States and that such seizures were made in accordance with the laws of the United States, enacted for the protection of their property interest in the fur-seals which frequent Behring Sea and breed only upon the Pribiloff Islands which Islands are part of the territory of the United States.

In page 135 just above the signature occur these words.

The Government of United States, in closing its presentation of the matters in controversy by his reply to the printed Case of Great Britain re-asserts the positions taken in its prited Case and all of the propositions and conclusions contained therein, and is prepared to maintain the same by argument before the Tribunal of Arbitration.

And that which I read from page 301 and page 303 of the United States Case are among those very conclusions to which attention is there directed. One scarcely needs to refer to the words of the Treaty for this purpose but when you remember the opening words of the preamble so often referred to by the members of the Arbitration.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States in the waters of Behring's Sea and concerning —

and so on; and, at the beginning of article I the same words occur, and we are to be told to-day that no question arises as to justification, legality, or validity of those acts. I do not understand what is the meaning of the pages and pages of the written argument of my learned friend Mr Phelps justifying these very acts which he now says he is not concerned to defend either in the past or in the future on the ground that they are what he has called " defensive regulations ".

We shall understand more distinctly what Mr Phelps' meaning is

when he argues, but I could not allow that observation to pass without a respectful protest before this Tribunal having regard to the position in which Great Britain is placed, and to the circumstances out of which this Arbitration arose.

I stated the other day that I should say a word or two upon a point suggested by a member of this Tribunal, that this Tribunal was not bound to act upon the principles of either municipal or international law.

The President. — Is that all that you have to say with reference to what Mr Phelps said yesterday?

Sir Richard Webster. — It is.

The President. — Then, Mr Phelps, you will no doubt be kind enough to note what has been said.

Sir Richard Webster. — When Mr Phelps comes to reply, Sir, I have no doubt he will deal with it.

Now as I said I stated two or three days ago I would not fail to notice a point suggested by one member of the Tribunal that though analogy from municipal law might be of use, I only put my own paraphrase of his meaning — although the analogy of existing, recognized, international law might be of use, this Tribunal was in a sort of position to award the right of property or the right of protection independently of there being by international law, any such right recognized, existing or known. All I can say is this, again respectfully to protest against such a question being imported into the jurisdiction of this Tribunal, or against it being suggested that when the words : The questions which have arisen respecting the rights of property, respecting the rights of jurisdiction, of the United States " — when those questions were framed it was contemplated that this Tribunal should decide otherwise than as jurists addressed by lawyers, and applying principles of law. You will remember that the Treaty provides that the Arbitrators selected by the foreign nations shall be jurists of distinguished reputation, in their respective countries.

Mr Phelps. — We claim nothing different from that.

Sir Richard Webster. — I am extremely obliged to my learned friend, Mr Phelps, and I thank him for his perfectly courteous observation. I was going to have pointed out that I did not understand my learned friend Mr Carter's argument in any way to deviate from that position.

Mr Phelps. — No.

Sir Richard Webster. — I merely mention this because I stated in reference to an observation made that I should deal with it, but there is some little justification in the Tribunal thinking that such a thing was going to be contended from the language of Mr Coudert, which I only notice in passing to show what I had in my mind. One of the two passages to which I refer is at page 552 of the revised print, and is in these words.

Well in arguing before this High Tribunal the word " right " is most extensive.

If there were any Tribunal of lesser dignity that could determine this question we would not have called upon you. The mere calling upon you enlarges the domain of right.

And on page 575 the same idea is repeated by Mr Coudert in these words.

Because it is law that we want. Law in its best sense, in its highest sense, in its most moral sense ; the law that would be expected not from a statutory Tribunal, not the law that would be expected from one nation or the other, confined within narrow limitations which sometimes strangle the right ; but from a Tribunal formed for the very purpose of expanding, enlarging and recognizing the beauty and greatness of international law.

Sir, I do not believe that there is any difference between Mr Carter, Mr Phelps and myself upon this matter, but, on the other hand, I did not feel it respectful to the Tribunal to abstain from making the observation in answer to a suggestion falling from one of your body. May I remind you, Mr President, that the original and only cause of this Arbitration was the interference with the pelagic sealers in catching the seals, in shooting the seals in the non-territorial waters of Behring Sea, and the seizure of the British ships and their condemnation by the American Court, and I point once more to the language of this Treaty, both the opening words of article I, and articles VI and VII, making the most marked distinction between Regulations which are only to be considered in the event of the concurrence of Great Britain being necessary, and rights which the United States possess independently of Great Britain at all. That distinction would have been wholly unnecessary and wholly out of place if it was supposed that the only function and jurisdiction of this Tribunal was to deal with joint rights, or joint privileges and joint interests. Those joint rights, joint privileges and joint interests have to be considered under article VII, and have no place whatever under article VI.

Sir, there is but one other independent branch of this case to which I desire for a few moments to direct attention; and that is with reference to that which is the real principle for which Great Britain is contending. In many passages of my learned friend Mr Carter's speech, he indicated that we were morally wrong in contending for the right of our nationals to shoot seals upon upon the high seas, and in many of the passages of the written Argument my learned friends have declined to recognize the right of catching, fishing, shooting, — I care not what word be given to it; probably capturing seals is the best word to give, — upon the high seas as being a right at all. Our position is this, Sir; that, apart from Treaty, apart from agreement between nations, the subjects of all cannot be restrained and restricted in the exercise of their natural rights, the right of catching wild animals upon the high seas, be they whales, be they seals, be they sea-otters, be they porpoise, turtles, walrus or fish; for that is one of the natural rights that all nations equally enjoy.

My learned friend the Attorney General cited a few of the leading authorities on this point. Probably it will be sufficient for my purpose if I

enumerate them to you. Chancellor Kent, Heffter, Martens, Wheaton, Manning. If my learned friends desire the actual references, or if the Tribunal desire the references, I will give them. It will be perhaps of some little assistance if I do so. In Heffter, the passage which I should desire to direct the attention of the Tribunal to is at page 149.

Mr Justice Harlan. — What edition?

Sir Richard Webster. — The third edition revised and enlarged by the author. Martens, " Traité de Droit international ", page 197. There appears to be only one edition, published in Paris in the year 1883. Manning I should cite from the edition of 1875, the one edited by a gentleman no longer living — a most distinguished lawyer — Mr Sheldon Amos; I cite from page 119 of that edition. Chancellor Kent I cite from the edition of 1878 edited by Mr Abdy at page 97 — Kent's Commentaries on International Law. Chancellor Kent's own words, (not Mr Abdy's) are these : —

> The open sea is not capable of being possessed as private property. The free use of the ocean for navigation and fishing is common to all mankind and the public. Jurists generally and explicitly deny that the main ocean can ever be appropriated The subjects of all nations meet there in time of peace on terms of equality and independence.

Those are Chancellor Kent's own words. It must not be thought that I am not reading the other passages because they are not equally pertinent, but it is out of regard to the Tribunal looking to the time I have occupied. I merely read that passage, because I understood the Tribunal desired to know from what particular book of Chancellor Kent's, I was reading and whether it was his language.

Mr Justice Harlan. — I never saw that book before. I suppose what is in that book is in the first volume.

Sir Richard Webster. — This is Kent's Commentaries on International Law', which I believe forms one of the volumes of his Commentaries.

Mr Phelps. — It forms part of the first volume.

Sir Richard Webster. — That is my recollection exactly. It forms the opening 300 or 400 pages of one of the first volumes of Chancellor Kent's book. Then Sir Travers Twiss'work on " The Law of Nations in Time of Peace ". I read from the edition of 1884 by Sir Travers Twiss at page 285. Sir, these authorities might have been multiplied to a much larger extent. I do not know among the authorities cited by my learned friend any which in any way conflict with my contention. In fact, my friends put their case on narrower grounds and on different principles; but there is one to which I wish to call attention because we have been twitted both in the written Counter Case of the United States and orally in argument with having misunderstood those points, and that is the enunciation of the law made on behalf of the United States in the year 1832, when the question of the " Harriett " arose in the Falkland Islands. It is referred to and set out at length in the British Case, and in order to quote nothing as to which there is any dispute, I refer entirely to the doc-

uments set out at pages 185 to 191 of the United States Counter Case. Possibly, the Tribunal will be kind enough to take that volume before them. I have also examined the original documents and find nothing conflicting with the position I am now about to submit.

The criticism that is made by the United States when we used the language of the United States in regard to their rights is : At that time there was no question of deep sea fishing involved, and therefore it is not pertinent to the question in respect of which you, the British Government, cite the authority. Well, if it were true in fact it would not be any answer to the argument inasmuch as the United States have enunciated the law in most general terms, but it is not the fact. Buenos Ayres was threatening to interfere not only with the seal fishery but the whale fishery, and it is pointed out in these papers that whales were caught outside the 3 mile limit, and it is in connection with a claim by Buenos Ayres to stop and interfere with vessels doing two things, whaling and sealing; and the seals undoubtedly were caught on the uninhabited shores of certain islands as to which there was a dispute with regard to territory.

I will show from these original documents it is not an answer to the British argument, founded on the enunciation of the law by the United States themselves, to say that the only question there raised was as to killing seals on land, and that no question had arisen as to killing them on the high seas. Will you Mr President look at page 186.

> The undersigned would also call the attention of His Excellency, the Minister of Foreign Affairs, to certain declarations of Don Luis Vernet, important as coming from a high functionary of this Government, the military and civic governor of an extensive region, and if these declarations are to be considered as indicative of the sentiments and views of this Government there would be just cause for apprehending that a project was in contemplation involving the destruction of one of the most important and valuable national interests of the United States, *the whale fishery*.

You will observe that that is italicised.

> For he declared to Captain Davison that it was his determination to capture all American vessels, including *whaling ships* as well as those engaged in catching seals, upon the arrival of an armed schooner, for which he had contracted, which was to carry six guns and a complement of fifty men.

The italics are not ours. I should gather from the way in which it is printed those italicised words occur in the original; at any rate I only read from the United States document.

Then on page 187 :

> But had the Governor, in the exercise of his authority, confined himself merely to the capture of American vessels, and to the institution of processes before the regular tribunals which administer the laws in this country with the sole view of ascertaining whether transgressions against the laws and sovereignty of this Republic had or had not been committed, and had he so done in strict persuance of his delegated authority, yet in view of the Government of the United States even an exercise of authority thus limited, would have been an essential violation of their maritime rights; and the undersigned is instructed and authorized to say that they

utterly deny the existence of any right in this Republic to interrupt, molest, detain, or capture any vessels belonging to citizens of the United States of America or any persons being citizens of those States, engaged in taking seals, or whales, or any species of fish or marine animals in any of the waters, or on any of the shores or lands, of any or either of the Falkland islands, Terra del Fuego, Cape Horn, or any of the adjacent islands in the Atlantic Ocean.

Now after some further negociations which I have looked through and which are not material for my purpose a further document was sent from the American Chargé d'Affaires to the Buenos-Ayres Minister on the 10th July 1832 and on page 188 there is this discussion about sovereignty.

We were told at one stage of this Argument the whole question in dispute was as to whether the Argentine Republic had the right of sovereignty. At the bottom of page 180 that question is put on one side showing it was not at the root of discussion.

The following is the passage.

But again if the rights of Spain to these Islands were undoubted, and if, again, it be admitted hypothetically that the ancient vice-royalty of the Rio de la Plata, by virtue of the Revolution of the 25th of May, 1810, has succeeded in full sovereignty to those rights would that admission sustain the claim which the province of Buenos-Ayres, or in other words, the Argentine Republic, sets up to sovereignty and jurisdiction.

Then again in page 189.

But again if it be admitted hypothetically that the Argentine Republic did succeed to the entire rights of Spain over these regions and that when she succeeded Spain was possessed of sovereign rights, the question is certainly worth examination whether the right to exclude American vessels and American citizens from the fisheries there is incident to such a succession of sovereignty. The ocean fishery is a natural right, which all nations may enjoy in common.

This would not be necessary if they were discussing the question simply of going on the land.

The ocean fishery is a natural right, which all Nations may enjoy in common. Every interference with it by a foreign Power is a natural wrong. When it is carried on within the marine league of the coast which has been designated as the extent of natural jurisdiction reason seems to dictate a restriction, if under pretext of carrying on the fishery, an evasion of the revenue laws of the country may reasonably be apprehended, or any other serious injury to the sovereign of the coast, he has a right to prohibit it; but as such prohibition derogates from a natural right, the evil to be apprehended ought to be a real, not an imaginary one. No such evil can be apprehended on a desert and uninhabited coast; therefore such coasts form no exception to the common right of fishing in the seas adjoining them. All the reasoning on this subject applies to the large bays of the ocean, the entrance to which cannot be defended; and this is the doctrine of Vattel, chapter 23 section 291 who expressly cites the Straits of Magellan as an instance for the application of the rule.

I point out in passing Mr President that you will observe from the point of view of the enunciation of the law if it be right — from the point of view of authority the question of going into the territorial waters becomes immaterial because, as was pointed out, they were only justifying going within the marine league, that is to say going within the dis-

tance of territorial waters for certain purposes : their real justification was fishing in the high seas. Now if you will turn over to page 190 I shall be able to conclude what I have to say in this matter.

The treaty concluded between Great Britain and Spain, in 1790 already alluded to, is to be viewed, in reference to this subject; because both nations by restricting themselves from forming settlements evidently intended that the fishery should be left open both in the waters and on the shores of these islands, and perfectly free so that no individual claim for damage, for the use of the shores, should ever arise. That case, however, could scarcely occur, for whales are invariably taken at sea, and generally without the marine league, and seals on rocks and sandy beaches incapable of cultivation. The stipulation in the treaty of 1790 is clearly founded on the right to use the unsettled shores for the purpose of fishery, and to secure its continuance.

I need scarcely point out to this Tribunal, because the perusal of the papers is sufficient, that the whole of this argument as to the whales would have been out of place and altogether unnecessary if it was true as suggested the only question was the right of going on shore.

Now look at the conclusions :

The following conclusions, from the premises laid down are inevitable :

1 That the right of the United States to the ocean fishery and in the bays, arms of the sea, gulfs and other inlets incapable of being fortified, is perfect and entire.

2 That the right of the ocean within a marine league of the shore, where the approach cannot be injurious to the sovereign of the country — as it cannot be on uninhabited regions, or such as are occupied altogether by savages — is equally perfect.

3 That the shores of such regions can be used as freely as the waters : a right arising from the same principle.

That a constant and uninterrupted use of the shores for the purposes of a fishery, would give the right, perfect and entire, although settlements on such shores should be subsequently formed or established.

Mr President, you expressed an opinion, which I have no right to criticise, some days ago that it must not be taken as recognized international law that this right of landing on unoccupied coasts certainly is recognised at the present day. I need scarcely remind you that I respectfully agreed, as far as an advocate was entitled to agree with that expression of opinion; but I pointed out that at the time of which we were speaking it was a common thing for Nations to contend that there was such a right.

The President. — It was a question of sovereignty.

Sir Richard Webster. — But, from the point of view of argument in this case, if General Foster's contention were correct, it would only strengthen my position; because the claim made by the United States, to catch whales, and to visit inhabited coasts, was put simply and solely as a branch of the right of fishing on the high seas.

General Foster. — It was that the vessel was seized for taking seals on land.

Sir Richard Webster. — With great deference, (General Foster will pardon me for saying it) there is no necessity for that interruption, be-

cause I refer to what the United States said with regard to the threats of Buenos-Ayres to stop the vessels whaling and as to the question that had arisen independently of a particular ship. You cannot exclude or cut away from the utterances of a Nation in this way. It suits the United States to endeavour to belittle the statements made by their Representatives in 1832, and it has suited them in many other points in this case to endeavour to do away with the effect of utterances previously made by United States' Statesmen of great eminence; but my submission in reply to the interlocutory observation of General Foster is, that when you read these documents, whatever claim was asserted was asserted as flowing from the right of all nations to fish upon the high seas; and the only effect of adopting General Foster's criticism would be that that right would be cut down in so far as it did not give Nations the right of touching or of landing upon uninhabited coasts.

Sir, I submit to this Tribunal that so far from the strength of that quotation, which is of equal point whether the Statesman was of the United States, or Russian, or French, or of any other Power, — the strength of that citation is in no way removed by the documents to which I have called attention. On the contrary, they support to the letter and in full the arguments we founded upon them when our Case was framed.

But, Sir, quite apart from authority, quite apart from the utterances of any Statesman in the past, will you consider for a moment what the end of this, and the result of this United States' claim, must be?

Feeling pressed by the distinction or by the argument which would be used in connection with such fish as salmon, in connection with such fish as the knowledge of the world at the present day knows to return to their local habitation for the purpose of breeding, of which the annual increase can be taken and of which the same selection can be made as is purported to be made with seals with this additional incident, that they are actually bred artificially to increase the stock, my learned friend, Mr Carter, endeavoured to get rid of that difficulty (a difficulty which, we submit, is bound up with and is one of the vices of his argument) by saying the distinction in the case of fish is that they are inexhaustible. Is that the present condition of knowledge either of the United States, or of Great Britain, or of any other Nation? This Tribunal is asked to recognize as a matter of international law a property in wild animals — to recognize a right of protection, — that the animals are to be considered to belong to the United States all over the sea? The argument is weak indeed if my learned friend thinks he can distinguish the case of fish on the ground of the inexhaustibility being a sufficient answer. What has been happening? May I remind you, and I have no doubt you have some knowledge of it (certainly some members of the Tribunal have) the United States, France, Canada, and Great Britain in various parts of the world have had to consider the exhaustion of fisheries and fishing banks, and they are re-stocking them by artificial means, and further it has come out in that examination that practically all of these fish,

certainly the principal fish, can be identified as coming from a particular place and are of such a character even that the fish can be identified as having been bred at a particular place and are returning to it.

It would be very interesting to go into this, Mr President, if it were closer to this case; but I do not know if this Tribunal knows that Mr Neilsen one of the most experienced inspectors of fisheries in Norway was sent to the other side of the Atlantic to advise the Newfoundland Fisheries in this matter, and Professor Baird — I do not know whether he still lives — probably the most eminent naturalist as to fisheries in the United States had advocated the re-stocking of the deep sea fisheries and had advised that other nations should commence re-stocking and artificially hatching in order to replenish the races of fish them becoming exhausted, and that all these gentlemen from their researches in these matters, Professor Baird among the number, Mr Neilsen among the number, have found that each of the various species of cod have their own local *habitat* and can be readily and easily distinguished. St. George's fish are known from any other kind of cod caught on the Banks. Cape St. Mary's cod are distinguished from any other kind of cod in Newfoundland; and a Trinity Bay fish is known from a Placentia fish. Itwould interest this Tribunal upon the question of the principle of law attempted to be pressed upon it; if there is any reason or logic in it, I could show that it would have such a far-reaching effect that the principle applied to this particular case would lead nations to claim that each individual animal or fish that could be identified, or that could be shown to have bred and shown to return to its own breeding home, was to be the property of the particular nation that could prove it came there to breed, and they had there the power of destroying the whole of them at once or allowing a certain number to go free. Perhaps also, Sir, you know, and it may be interesting to the Tribunal I should mention that this has been the subject of a very learned discussion in France with reference to the stocking of exhausted fisheries on the French coasts. Therefore, my learned friends will forgive me for saying that I think it is impossible to draw the distinction they have attempted to draw between seals and fish on the ground, as they suggest, that in one case the animals are bred in such numbers that they are inexhaustible, because the experience all the world over is is that fisheries have become repeatedly depleted; and that further, if identification and habits of returning to the same locality, is to be a sufficient test, and if the power of destroying the whole, or abstaining from destruction is a sufficient claim, this claim must be recognized in respect of various migratory birds and various other animals which are of great use to mankind, probably of much greater use than the seals, the bodies of which are wasted, the oil of which is never reclaimed, and the skin only is used for the ornamentation of the dresses of certain persons who can afford to pay large sums for their apparel.

Mr President, I have said all that at the present stage I feel it necessary that I should say to this Tribunal. I have endeavoured only to

supplement the much wider, abler, and more exhaustive argument of my learned friend, the Attorney General, and it is no part of my duty, Sir to attempt to apply the arts of oratory or the influence of eloquence to the consideration of the questions submitted to this Tribunal. I have had two objects in view, and two only, that, so far as facts are involved, the true facts, all the facts, and the facts only shall be laid before this tribunal, that so far as enuncialed principles of law are involved those principles of law should be drawn from the best sources that are at our command, and without any attempt either to strain those principles in favour of, or to minimise their effect against, the contentions we are supporting. I am perhaps, more conscious than any one present of the deficiencies in my own argument, but I trust, with its defects, it may still have been of some service to this Tribunal; but, Mr President, what will remain for ever in my mind is the recollection of the unvarying courtesy and patience with which my observations have been received by every member of this Court.

The President. — Sir Richard, we thank you for the very substantial and useful observations with which you have supplemented the argument of Sir Charles Russell. We knew how much we were indebted to you already for the elaborate study you have made of this case on behalf of Great Britain, and I for one have very much admired the unrestricted and friendly co-operation of yesterday's Attorney General with to-day's Attorney General. The country is indeed to be envied where party spirit admits of such brotherly association when the national interest is at stake.

Mr Robinson. — I feel very strongly indeed, Mr President, the position in which I am placed in being called upon to address the Tribunal at this stage of the discussion; but I shall be spared the necessity of further personal allusion if I may ask the Tribunal to be allowed to apply to myself, but with very much added force, the few well chosen observations with which my friend who precedes me has prefaced his argument. To me, I am afraid for a number of years longer than for him, the work of a junior Counsel has also been unaccustomed; but there are two considerations which may reconcile one, at all events to a certain extent, to recurring, for a time, to the labour of earlier years. Many gentlemen of our profession I believe would say that the place even of a junior in a great national controversy of this description, is to be preferred to the work of a senior in the ordinary duties of daily practice; and in the next place, if I may be allowed to make an observation purely personal, may I say that all the surroundings and circumstances of this case in its conduct here, and, much more, all the personal associations connected with it on every side, have been such, whatever the duties may be, important or unimportant, accustomed or unaccustomed, as to make it only a pleasure to discharge them as best one might be able.

If it has been difficult for my learned friend to follow the Attorney General (as I can well understand that it was), I trust it will be remem-

bered how much greater the difficulty must be for me to follow not only the Attorney General, but my learned friend Sir Richard Webster as well. If I may use a simile, Mr President, not altogether appropriate to our serious work here, it does seem to me that I am called upon to perform a task, which, while it can no doubt be best performed in the place where we are, can seldom be successfully performed by one of my own nationals. I am called upon, I fear, to present to the Tribunal something not altogether distasteful, something which may possibly not be altogether useless, but which must be made up of scraps and of leavings — the scraps and the leavings of very much better artists, and artists I may say, who have found the material so attractive, that even what they have left is not very good of its kind; by which I mean that if there any points in this case which have not been thoroughly discussed, you will find that they are naturally the points which it is least useful to discuss. At all events I have felt very strongly, that if I could consult only the interest of the case and of valuable time, and follow the dictates only of my own judgment, I should say say at once the only thing which I am able to say without doubt or hesitation — that every thing that can be said in the case on our side has been already said, and well said, and that it can serve no useful purpose to attempt to add to it.

But, there is one thing, Mr President, of which I am quite certain : It could not be of any possible assistance to the Tribunal, and therefore it would not be becoming in me, if I were to attempt to follow my learned leaders into any branch of this case in anything approaching to detail. The case has been exhaustively and thoroughly discussed, as it was absolutely necessary that it should be discussed, and for very obvious reasons. I do not think it is too much to say that Arbitrations as a means for the settlement of International disputes may be said to be yet upon their trial. There are very many who believe — all right minded men most earnestly hope — that to an increasing extent they may become the substitute for the only means, so terrible in its consequences, which can be made available in their place; but if they are to do this they must justify themselves by their works. There are many people I believe now watching this Arbitration most anxiously, who know very little of the merits of the case, and who care absolutely nothing for the success or failure of either of the contending parties; but they watch it in the hope that it will show to the World, and to the two nations who are engaged in it, that if Nations do not obtain certainly by these means all that they might possibly have obtained by the test of war — by the test of *might* — they are at least certain to secure all that they they can shew themselves entitled to by the far preferable and more reasonable test of *right*. It was necessary therefore, and essential, that every principle involved in this case, every consideration which either side might think it worth while to bring to the attention of the Tribunal, should be carefully and anxiously examined — every principle which is thought applicable tested, and traced to its source — and every argu-

ment great or small which could have any bearing on the case should be most anxiously weighed. But, while this is the case, there is as it appears to me one feature peculiar to this Arbitration considered in its International aspect. Most International Arbitrations, so far as I am aware, have been concerned with the exercise of belligerent rights, or with the question of territorial or maritime boundaries, which could only he determined by the principles of International law; but it so happens that the most important questions in this case — those upon which in substance it must ultimately turn — might have arisen between individuals, and might have come up for decision in any ordinary Court in either of the countries interested.

It is possible of course to conceive (though I think it very difficult), that the decision as between individuals might be different from that which it should be as between nations. I say this, because I know that is indicated in some portions of the argument on the other side, but still I think this is hardly a possible conception; and what I propose to do, therefore, as the only course which it seems to me can avoid prolixity, and may at the same time be of some possible use, is to assume that this case has come up (as it might come up), by one individual against another, to be determined by the ordinary courts of either of the countries interested, and endeavour to point out what considerations it would then have presented, and upon what grounds the case would have been disposed of.

Suppose for example it had been a claim, as it might well have been if these islands had been owned by a private individual — suppose it had been a claim by one of the owners of these islands against a pelagic sealer, for the destruction of a quantity of seals from the islands — you may say 1,000 dollars worth or 10.000 dollars worth; it is immaterial — and that it had come up for disposition in one of the ordinary courts of either country, in what shape would it then have presented itself to the judge, and in what way, or upon what grounds, would it probably have been disposed of? Now, I apprehend, the first thing that would have struck anyone in such a case would have been the absolute novelty of the claim, which at this stage of the world's history is certainly a consideration entitled to some weight. I think it would occur to any judge before whom it was brought to say :

If there is one principle better established than another, it is the freedom of the seas to all the world — the equality of all nations upon the high seas, and the right of all people to take whatever they may find there in the shape of free swimming fish or animals, as they may be able to secure them. I think it would be asked : how do seals form an exception to the universal rule? And with regard to seals themselves it would be very properly observed : The seals have been swimming the ocean — both the great oceans of the world, the Pacific and the Atlantic — and they have been the subject of pursuit by man, since long before the memory of man. Has there ever been up to this time a claim made by any

nation or by any individual to property in those animals? That certainly must have been answered in the negative; and if the question were tested further, I think the explanation would have been asked : have you considered the analogy between all other animals of the same kind and of the same nature — animals *feræ naturæ*, as we may suppose these seals to be for the moment. I think the case would have been put of pheasants and rabbits and innumerable other wild animals, as to the law of which there is no question whatever, and the Plaintiff's would have been asked to distinguish between the claim made in this case, and a claim prepertes in seals animals a birds. I question myself whether the case would have gone further. Whether it would have gone further or not, however I venture to submit that the onus would have been on the claimant — that is to say, I think it would have been said to him : You must distinguish this case from the general right as regards the high-seas, and from the universal law prevailing as to animals *feræ naturæ*. This has been attempted here and I therefore proceed to examine, as shortly as I can, the grounds which are taken here, and which would have been advanced in a case of that description in support of the claim.

Now there is some difficulty — at least I have found some difficulty — in ascertaining exactly on what ground that claim is put; but first it may be well to say a word upon a question which would probably I think, in a contest of that description, either have assumed no place at all, or would at least have assumed a place even more unimportant than it has now been relegated to by the present contention of our friends. I am speaking now of what may be called the derivative title from Russia, and I think that may be put in a very few words indeed, as I should put it, viewing the Case as I am now endeavouring to consider it.

I do not desire to go into the Ukase of 1799, or to treat this question otherwise than in a very cursory manner; but if the question of the derivative rights of Russia and the Ukase of 1821 had come up for consideration, this much at all events would have been plain — that that Ukase was the cause of the Treaties of 1824 and 1825, and those Treaties were the result of that Ukase.

Now the assertion on the part of the United States is, that in those Treaties the phrase " Pacific Ocean " does not include Behring Sea, and that the term " north west coast " — (without going into details, or without speaking of the different meanings given to it) practically means the north-west coast south of the Alaskan Peninsula.

Let us look at the two or there documents upon which this substantially depends.

In the first place, there can be no question as to what the Ukase itself says, or as to its meaning. We should have to ascertain I think — we should have to ask ourselves — upon this question : What was it that the Ukase claimed : What was it that Russia asserted that they were claiming by the Ukase? What did the United States and England understand them to claim? Against what portion of that claim — if not

against all — did they protest; and how was their protest treated by Russia? Did she withdraw the claim, or or only a part?

Now we find that the Ukase, to use the words of section I, which I read from the Case of Great Britain, p. 38, says that :

> The pursuits of commerce, whaling and fishery, and of all other industry on all islands, ports, and gulfs including the whole of the north west coast of America, beginning from Behring's Straits to the 51° degree of northern latitude, also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring's Straits to the South Cape of the Island of Urup, viz, to the 45° 50° northern latitude, is exclusively granted to Russian subjects.

No one would question what is the meaning of " north-west coast " in those words:

> The whole of the north-west coast of America, beginning from Behring's Straits,

Going Southward.

> to the 51° of northern latitude.

There can be no question about that. Therefore the Ukase, at the beginning, puts a perfectly plain and unmistakable meaning on the words, " north-west coast. "

Then that was transmitted to Mr Adams on the 11th of February 1822, and his reception of it is to be found in his letter of the 25th of February 1822, in which he says : British Case p. 47.

> I am directed by the President of the United States to inform you that he has seen with surprise, in this Edict, the assertion of a territorial claim on the part of Russia, extending to the 51st degree of north latitude on this continent.

I take that to mean extending southward to the 51st degree of north latitude on this continent. He then continues :

> And a Regulation interdicting to all commercial vessels other than Russian, upon the penalty of seizure and confiscation, the approach upon the high seas within 100 Italian miles of the shores to which that claim is made to apply.

There, again, it would seem to me, wehave Mr Adams' very clear apprehension that it was a territorital claim of the coast down to the 51st degree of northern latitude, and an interdict of approaching, on the high-seas, within 100 miles of that coast.

Now M. de Poletica answers that in words which have always appeared to me, and I venture to say must appear to anyone, unmistakable and clear. These objections on the part of the United States to the claim of Russia having been called, as I understand, to their attention, M. de Poletica answers in these terms : British Case p. 48.

> I ought, in the last place, to request you to consider, Sir, that the Russian possessions in the Pacific Ocean extend, on the north-west coast of America, from Behring Straits to the 51st degree of north latitude.

Now is there any possibility of doubt as to what that means? They speak of " Pacific Ocean ", and they speak of " the north-west coast ".

Can anybody contend for a moment that " Pacific Ocean ", there did not include Behring Sea, or that the " north-west coast " did not include the coast up to Behring Straits?

It would be impossible to express that meaning in words more plain, more conclusive, or more clear — I do not know how it could be done. The Russian possessions — he asserts — " in the Pacific Ocean extend, on the north-west coast of America " . . . " from Behring Straits to the 51st degree of north latitude ". The letter then goes on :

> The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (mers fermées).

and so on. I need not read the sentence again.

Then Mr Adams answers that by saying : P. 49.

> With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4000 miles.

Now that applies to Behring Sea again, because it is only ther that these territories belonging to Russia exist — I mean that the American and Asiatic shores are to be found opposite.

Then on the 22nd July (after some previous correspondence which it is not necessary to refer to), Mr Adams writes in these terms : P. 50.

> From the tenour of the Ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the 45th degree of north latitude, on the Asiatic coast, to the latitude of 51 north on the western coast of the American Continent.

Is there any possibility of doubt as to what Mr Adams understood to be the claim which was asserted on the part of Russia? He defines it in the words of the Ukase, and puts it in words which can admit of only one meaning, because from the 45th degree of north latitude, on the Asiatic coast, to the latitude of 51 north on the werstern coast of the American Continent, is practically going round in a semi-circle, so to speak. Then his letter continues :

> And they assume the right of interdicting the navigation and the fishery of al other nations to the extent of 100 miles from the whole of that coast.
> The United States can admit no part of these claims.

That will he found at page 50 of the British Case. Is it possible to state the claim more clearly, or to made the denial which followed more explicit, and comprehensive; could you have the assertion on the one hand and the denial on the other, and the issue which is joined between the two parties, more clear and distinct?

There we have the issue thus joined. The negociations then went on from that time, as you know, for a year in one case — for more than a year in the other : that is to say, the Treaty with the United States was

made in 1824, and the Treaty with Great Britain in 1825. Both Treaties are to be found at page 59, worded in almost precisely the same way. The attitude assumed by Russia as the result of all these negociations is found in the Treaty signed by her. Article I of the Convention between Russia and the United States is as follows :

> It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the High Contracting Powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles.

There was, therefore, a clear renunciation of any exclusive rights in the Pacific Ocean. Now I venture to say that at least this is clear : Unless you can find in the correspondence somewhere some change from the meaning of the words put upon them in the Ukase — put upon them by M de Poletica in his construction — put upon them by Mr Adams in his denial of claim, all doubt is at an end. I do not desire to pursue that further, because it has been gone into by the learned Attorney General very much in detail, and carefully.

It has been touched upon also by my learned friend Sir Richard Webster; and all that I venture to say upon that is this : that if there can be found one syllable in the correspondence following the Ukase — following the claim — following the denial of the claim — which tends to shew that either Great Britain or the United States withdrew any part of their explicit and comprehensive denial, or that Russia reserved to herself any part of the rights she asserted by the Ukase, it has escaped my attention after several very careful readings; and I do not think there can be any object in my pursuing it further, because the Tribunal will have in their minds all the different correspondence which has been called to their attention on both sides. I think there are numerous expressions, and they are all to be found set out in our case, in which, so far from there being any change of the meaning or intention on the part of Russia or on the part of either Great Britain or the United States to be found, there are several letters which show quite plainly that both of those Powers were always adhering to their original denial, and that Great Britain and the United States considered that Russia had relinquished all that she claimed. And again I submit the test which was submitted by the Attorney General : Can anyone, reading that correspondence with care, point to any one time during the negotiations, when, if Russia had said either to the United States or to Great Britain, we will give up all our claim except Behring Sea, her condition would have been even listened to for one moment. If not, then there is an end of that question; and I am content to leave it there.

With regard to the question of maritime claim as distinguished from territorial claim, I think it may be said with truth that to both the United States and to Great Britain the more essential object was the maritime

claim; but that perhaps there is some slight difference in this respect-that the United States, as would be natural, possibly attached some little more importance to the territorial claim than Great Britain did, because Great Britain evidently thought nothing whatever about it.

I was struck with one letter, which I do not think has been referred to in the course of this discussion, which impressed itself on my mind, and which is to be found in the second volume of the Appendix to the British Case at page 54. This letter was written in March 1824, and Sir Charles Bagot then represented Great Britain. They were then negotiating about the territorial question, which it was found difficult to settle, and all the negotiations were suspended.

Sir Charles Bagot said to Count Nesselrode that :

> If a territorial arrangement perfectly satisfactory to both parties could not now be made it might possibly be thought by my Government that our respective pretensions might still remain without any serious inconvenience in the state in which they had before stood, and that it would only be necessary for the present to confine their attention to the adjustment of the more urgent point of the maritime pretension, a point which would not admit of equal postponement.
>
> In reply to this observation Count Nesselrode stated, to my extreme surprise, that if the territorial arrangement was not completed, he did not see the necessity of making any agreement respecting the maritime question ; and I found myself most unexpectedly under the necessity of again explaining very distinctly, both to him and to M. Poletica, that the maritime pretension of Russia was one which, violating as it did the first and most established principles of all public maritime law, admitted neither of explanation nor modification, and that my Government considered themselves possessed of a clear engagement on the part of Russia to retract in some way or other a pretension which could neither be justified nor enforced.

Now that struck me perhaps as the most emphatic piece of evidence pointing out the position taken by Great Britain. The territorial claim may wait; but when it is suggested by Russia, if we cannot settle the territorial claim there is no object in going on with the maritime claim it can wait too, Great Britain says, not for a moment; that must be utterly withdrawn; it can neither be modified or explained — it admits neither of explanation nor modification; and some where, I cannot myself at this moment remember what the letter is, but there is a letter which Mr George Canning wrote on the subject in which he says, I takeit for granted the maritime claim by Russia will be altogether withdrawn.

On the 8th of December, 1824, in the British Case at page 46, you will find a letter showing also the attitude by taken Great Britain ; but that has been referred to before :

> It is comparatively indifferent to us whether we hasten or postpone all questions respecting the limits of territorial possession on the continent of America, but the pretensions of the Russian Ukase of 1821 to exclusive dominion over the Pacific could not continue longer unrepealed without compelling us to take some measure of public and effectual remonstrance against it.

The expression of Mr Canning I have not at this moment before me, but it is of very little importance.

Now, you will not find, I believe, in this correspondence, which has

been all gone over, and some of it repeated, anything approaching to a distinction drawn, on the part of Russia, in words, between Behring Sea and the rest of the Pacific Ocean.

Then, as to the claims of Russia by early discovery prior to the issuing, of that Ukase and prior to the conclusion of these Treaties; I have only one word to say about that, because I think to some slight extent it has been a little misunderstood. I submit that it will be found, if you examine the papers, so far as it may become of any importance — and probably, in the view of the case I have suggested, it would hardly be worth while to mention it, — that Russia, by 1821, had not established any claim which she could successfully maintain against other nations north of the Alaska Peninsula.

If other nations had pushed their trade north of that Peninsula as they had at that time pushed it to the south, I submit anyone reading this correspondence will say that it would have been extremely difficult for Russia to resist their progress. All that there was at that time was one settlement, which was to be found on Bristol Bay, immediately north of the Alaskan Peninsula, in which (if I recollect rightly) the number of Whites was five; and that was a settlement formed in 1819 by Kossarovski. I find it difficult to reconcile the view taken by Mr Blaine in one of his despatches of the early title of Russia with that taken by Mr Adams at the time of these negotiations. At all events, there can be no question as to what the United States then thought of it, and while I say the United States thought comparatively little of the territorial title, though possibly they attached slightly more importance to it than Great Britain, I say that for this reason : if you refer again to our Appendix, Volume II, part 2, page 4, you will find that Mr Adams there says :

> I inclose herewith the *North American Review* for October 1822, No 37, which contains an article (page 370) written by a person fully master of the subject,

If you will look at the *North American Review*, which is given in our Appendix, volume I, page 33, you will find what is the view taken there, which Mr Adams affirms to be, as I should understand, the correct view, because he says it is an article written by a person thoroughly master of the subject. What the writer says is :

> We readily concede to Russia priority of discovery, first occupation, and are by no means disposed to disturb her « peaceable possession »,

that is quoting an expression used by M. de Poletica, in which he states that Russia's title was by occupancy early discovery and indisputed possession.

> We readily concede to Russia priority of discovery, first occupation, and are by no means disposed to disturb her " peaceable possession " of the Aleutian Islands and adjacent coast, including Cook's River, Prince Willam's Sound, and Behring Bay.

You observe all that is south of the Peninsula, and includes Cook's River, Prince William's Sound and Behring Bay.

> We are not remarkably disinterested in making this concession, for, to all prac-

tical purposes, we would as soon contend for one of the floating icebergs that are annually detached from the polar masses.

That is the estimate and value which the United States then put upon that Country, and it was a natural estimate, no doubt, to form of it at that time.

In a territorial point of view, it is of little importance whether those distant regions are inhabited by the aboriginal savage or the Siberian convict.

And then they go on to say, as I understand (but I will not detain the Tribunal by referring to it) that the title by which Russia claims that territory, described by them as so worthless, is by no means clear and is subject to doubt.

Now Mr Adams' view of the Russian title by early discovery and everything else at that time is to be found in the same letter to which I have already referred in our Appendix, vol. 2, part 2, page 4. That is a letter of Mr Adams, of which we did not give all, and for the rest I am about to refer to the Appendix to the American Case, vol. 1, page 146. That is the letter of July 22nd, the same letter; but I do not find this passage in our version of the letter in our Appendix. My learned friend tells me it is in our Counter Case; but in page 146 of the American Appendix, vol. 1 of the Case of the United States, Mr Adams there says : —

When Mr Poletica, the late Russian minister here was called upon to set forth the grounds of right conformable to the laws of nations which authorized the issuing of this decree, he answered in his letters of February 28th and April 2, 1822, by alleging first discovery, occupancy, and uninterrupted possession.

It appears upon examination that these claims have no foundation in fact. The right of *discovery* on this continent, claimable by Russia, is reduced to the probability that, in 1741, Captain Tchirikoff saw from the sea the mountain called St Elias, in about the fifty-ninth degree of north latitude. The Spanish navigators, as early as 1582, had discovered as far north as 57° 30'.

As to occupancy, Captain Cook, in 1779, had the express declaration of Mr Ismaeloff, the chief of the Russian settlement at Unalaska, that they *knew nothing* of the continent in America.

I will not pursue this subject. I have only cited that to show what Mr Adams' view was of the claim then advanced by Russia, if they had thought it worth while to contest it or thought the territory of any value. The view which I submit to the Tribunal is simply this : If it had become a question between Russia claiming under the discoveries of Behring and Tchirikoff and England claiming under the discovery of Captain Cook in 1748, it would have been, to say the least of it, doubtful whether England had not a better claim, as Captain Cook had not only discovered the coast, but had landed and taken possession; while Tchirikoff had simply seen the coast at a distance and landed on an island; and Mr Adams' goes on to say that landing on an island has never been considered to give a claim to the continent adjacent to it. I say that I find it difficult to reconcile his with Mr Blain's despatch of 30th June 1890, to be found in the 3rd volume of the Appendix to the British Case at page 498.

Mr Justice Harlan. — What you read was no doubt in the letter of

the same date from Mr Adams to Mr Rush, on page 6 of your volume II. Parl. 2. In the British copy that part you read is omitted.

Mr Robinson. — Yes, I had noted between the first and second sentences, that there was this omission I do not know how it happened, but it is supplied in the the Appendix to our Counter Case Vol. I at page 56, and, therefore, it is of no consequence. I looked at it before the Counter Case had appeared, and made that note, and had forgotten to take a note of the fact that it was put in in full in the Counter Case.

Mr Tupper. — I may be permitted to say that these papers of the United States correspondence were printed from the blue book published by the United States Government in Washington in the year 1888 — a collection of all the papers relating to the subject — and they were taken in that way.

Mr Robinson. — As we have it now it is of no great importance how it came to be omitted earlier.

But Mr Blaine, I observe, writing on the 30th of June, 1890, Vol. III. Appendix to British Case, p. 498 says.

> If Mr Adams literally intended to confine Russian rights to those islands, all the discoveries of Vitus Behring and other great navigators are brushed away by one sweep of his pen, and a large chapter of history is but a fable.

Then he says at the foot of the page :

> Without immoderate presumption, Russia might have challenged the rights of others to assume territorial possessions; but no nation had shadow of cause or right to challenge her title to the vast regions of land and water which, before Mr Adams was Secretary of State, had become known as the "Russian possessions".

Now you see that at that time the United States having bought from Russia were standing upon that title, and of course, it being their own title, it was only natural that they should make the most of it; but we have to contrast the position, taken by the United States in 1823 with the position taken when they had purchased the title of Russia and were resting upon it. This is what Mr Blaine says here, which, as I have said, I find some difficulty in reconciling with the position taken by Mr Adams; and I submit that you will find that the position of Mr Adams is the right one.

In another place Mr Blaine asks whether it is likely, if Russia's title had not been good, the United States would have paid the sum of $7,200,000 for the territory. I have not that passage before me at this moment; but of course the answer to that is very obvious. Whatever Russia's rights might have been, they were conceded and settled to be down to 54° 40 by the treaties; and if the United States, forty years after the treaty, desired to acquire that property, it was necessary for them to pay for it whatever they might think it was worth; and I fancy that much as it increased between 1824 and 1867, it has probably increased more since that time.

So much then for those two points, which, in the view which I am endeavoring to take of the case, would have comparatively little bearing,

but I think they may be disposed of by simply asking the Tribunal to read the words which I have read from the correspondence, accompanying the words of the Ukase, the words of the protest, and compare with them the words of the Treaty; and as to the other, so far as it is material, to contrast Mr Adams' view of the title with that taken by Mr Blaine, and examine, if it is thought worth while, the history of the discoveries up to that time, and see which is the most correct. I venture to think, as it is natural that it should be, that Mr Adams, writing near the time, and having studied the question, will be found the more accurate of the two.

Then, if we are now to proceed to discuss in this general way the property claim advanced by the United States, the first thing that one finds ome difficulty in — at least, that I have found some difficulty in — is to ascertain exactly what form or what branch of their claim it is to which they attach the most importance, or mainly desire to stand upon, and by what law it is that they mainly desire to be governed. If I understand their claim, they claim a property first in the seals, if not in the seals then in the herd, if not in the herd, then in the industry; and they say that this claim is supported to all of these different subjects of claim by municipal law, and if not by municipal law, then by international law. For example, at page 132-3, in a portion of Mr Phelps' argument, he says that upon the ordinary principles of municipal law, they claim to be supported, and upon the broader principles of international law it becomes much more clear; and while they say that international law must govern, and while they admit that the municipal law of both countries may well be referred to, and may have great weight in deciding what international law is, they yet say that it must be remembered that the case is not necessarily to be governed by the municipal law of either nation, but by international law. I think, therefore, it will be well for me, without attempting to draw that distinction more accurately, because it seems to me to be difficult, and would only complicate and prolong the argument, it will be better to turn to their claim as they state it generally, and see how it is put by them.

The Tribunal will find their propositions at pages 47, 50, 91 and 132 of the printed argument. I refer to their printed argument, I may say, for the remarks I wish to make, because so far as I know their written argument is not in any substantial respect departed from or added to by the oral argument. Of course it is very much amplified and illustrated, but I do not think it is varied in any respect, added to in any respect or departed from in any way; and therefore, as it is perhaps more convenient for reference I desire to refer to the written argument of the United States. At the pages I have mentioned, you find the propositions which they say they have established, and upon which their claim of property rests. In the first place, they say that it is an easy thing, clear and intelligible to any ordinary mind, to appreciate the distinction between a property in the herd and a property in the seals. Well, I have only to admit with my learned friends my own utter incapacity to understand how that claim can

be supported. If they do not own each individual seal in the herd, how can they possibly own the herd? I do not think it was an exaggerated or an unreasonable analogy which the Attorney-General suggested, to a fleet of ships. A fleet is a number of ships, just as a herd is a number of seals; and I do not understand that any different principle of law applies, whether the herd consists of a hundred seals or a hundred thousand seals, or as to a fleet whether it consists of ten ships or a hundred ships; and is it possible that a nation could say as regards her fleet precisely what they say as regards their seals: "It may be you may destroy in any distant part of the world one of our jolly boats, or a small vessel, and we would have no claim against you; but we claim that you must not injure our fleet in any way or incapacitate it in any way so as to, make it inefficient for the purpose for which it was designed. Surely it would be absurd even to state that; and why is it more intelligible when you endeavor to apply the same principle to a herd of wild animals.

I apprehend, therefore, and I assume, that you must consider only the property in the seals. There are other difficulties attached to any contention of that sort, and one difficulty which exists in regard to some of the propositions which have been advanced here, as it seems to me, is that in the first place the propositions are vaguely stated and difficult to understand, and in the next place, they are absolutely impossible to work out. What is said here is, and you find that in two or three places, — at page 105, forexample, of their argument — they say the United States do not insist upon this extreme point, that is to say, the ownership of each seal, because it is not necessary. All that is needed for their purpose is that their property interest in the herd should be so far recognized as to justify a prohibition by them of any destructive pursuit of the animal calculated to injure the industry, and consequently their interest.

I may say in passing that I at first thought there might be some distinction intended between property and property interest. I do not think there is, because I find at pages 50 and 91 they are used interchangeably. I cannot see for myself what distinction there is, and I do not think there any is intended to be drawn.

If that is what they claim, how is it possible to define or carry out that claim or enforce it in practice. The pursuit is to be allowed until it be comes destructive. Who is to determine when it is destructive? A or B is carrying on pelagic sealing. He has killed a hundred seals, or fifty, or whatever you may choose to say. He has not injured the herd. The United States comes in and says, "Do not kill the hundred-and-first seal, because then you will begin to injure our industry." It is impossible, I submit, upon any legal principle whatever, to advance a claim of that sort. They either own the seals, one and all, or they do not own them. It must be either the one position or the other, and the rights of others with regard to those seals if they are not theirs, unless there is malice, cannot be possibly made to depend upon whether the pursuit is carried

to such an extent as to injure the industry founded and carried on by the United States. There are no means, in other words, of practically working out any such claim, nor are there any means of working out, if we are right, a claim of property in the seals. They feel the great difficulty, of course, of the inevitable result of their claim being to entitle them to say to any person pursuing a seal down at Cape Flattery. "That seal belongs to the United States; do not touch it"; and therefore they say they do not make their claim on that ground. But if that is the logical and inevitable result of the claim as they put it, they surely cannot make their claim a legal one or a sensible one by saying they do not want that result.

It is just the same with the Indians. When their claim comes in conflict with the immemorial rights of the Indians, Oh, they say, you may very well leave the Indians to us. We would not interfere with the Indians, provided they carry on their pursuit in such a way as not to hurt us. But the moment the pursuit of the Indians becomes an industry, then it must stop. In other words, we have a right because we have an industry, but the moment the Indians get an industry, then their right stops. Is there any way of putting that sort of claim to make it intelligible upon a legal basis and to a legal mind? And if all our evidence is correct — and I do no more than allude to it now, because it has been discussed once and may come up for further discussion when we begin to speak of regulations — if our evidence on intermingling of the seals is correct, it would be absolutely impossible to work out a property in the seals, for there would be no possibility of saying, when you find a seal far south of the Aleutians, from which herd it came. Practically those two streams of seals coming from the Commanders and from the Pribilofs are like two water spouts. When the water gets so far down that it wholly overflows the land, it is impossible to tell from which source any part of the water comes. When those seals, pouring out from both islands, intermingle together in the Pacific Ocean, it is absolutely impossible to say from which place they come, or to which place they belong. It is impossible to get rid of the evidence we have adduced upon that subject by the very simple and utterly ineffectual course of saying "there is no identity; it does not exist".

That is the answer made to that in two places in the argument of the United States, p. 49, 103. They simply say as to identity, "There is no identity, and therefore it gives no trouble. There is no possibility of identity, for the herds are absolutely distinct."

The Tribunal will consider the evidence of our witnesses upon that subject, and see upon what ground you can say they are not to be believed. They are added to, I believe, or affirmed, to some extent, by the evidence adduced on the part of my learned friends; but I do not desire to discuss that now.

Again at page 138, they say, they do not admit there need be extermination by our pelagic sealing.

It is not necessary to the argument that this extreme result should be made out. It would be enough to show that the interest in question is seriously embarrassed and prejudiced, or its product materially reduced, even though it were not altogether destroyed.

That is merely another repetition of the previous assertion that all that they contend against, and all that they claim to be entitled to prevent, is the destructive pursuit, to the prejudice to their industry. I need hardly repeat that it must be their property at at all times, or it cannot be their property at all. It cannot be their property the day after the first seal is killed which tends to injure their industry, and not the day before.

Senator Morgan. — Do you, in the position you take, mean to assert that there is no legal restriction upon the right of pelagic sealing?

Mr Robinson. — No legal restriction.

Senator Morgan. — Yes. No legal restriction?

Mr Robinson. — I should say no legal restriction. That I shall come to afterwards. Of course I need hardly say we are both of us anxious that there should be such restrictions as are reasonable and proper; but when you ask me whether there is a legal restriction, my argument is there is not.

Senator Morgan. — If you will allow me, suppose the Canadians were to send ships enough to those three or four gateways, I will call them, passes, in the Behring Sea, to intercept the seals absolutely from going to the Pribilof Islands; and that was done in the high seas. Would they be within the purview, as you think, of the legal right of the Canadians?

Mr Robinson. — As far as I know, I should think so. I would only say this: I have never myself seen the utility of putting extreme cases, which have not occurred and which never will occur.

Senator Morgan. — It is insisted here that it does occur.

Mr Robinson. — No. With great deference, sir, according to my recollection, there is no such assertion made.

Senator Morgan. — It is made in the argument of counsel.

Mr Robinson. — Then I can only say it is impossible it can occur. My recollection is — I have read to that effect — that the currents are so strong and the difficulty of fishing in those passes so great, that there is very little sealing done there — in fact, none at all, my learned friend says, who knows the details more intimately than I do, though I have read them at various times. If that were done, all I can say is that I know of no legal principle which would prevent it; and I do not believe any lawyer could point me to any legal principle which would prevent it; but I have no doubt in the world — and that is the true answer to all these impossible suggestions — that it would be stopped by convention and by treaty. It would not be to the interest of either party or either nation to do such a thing, and it would be stopped in that way.

Senator Morgan. — You think it could not be done under the powers conferred on this Tribunal?

Mr Robinson. — No; I think not except under regulations. Do not misunderstand me. I mean you cannot declare the law to be.

Senator Morgan. — A regulation when declared by the Tribunal has the effect of a law.

Mr Robinson. — I have nothing to say against that. I am coming to regulations afterwards, if you will permit me to follow the line of my argument.

Senator Morgan. — I am not trying to interrupt you, but I am merely saying that a regulation between these parties would be a law.

Mr Robinson. — I quite understand that. Regulations might go to such an extent as to change the law. I am not at present arguing that question; but they would change the law to the extent to which they affect any rights which the law gives.

The President. — You mean the law between the parties?

Mr Robinson. — The law between the parties; that is all, of course.

Senator Morgan. — That is the law I was referring to, the law between the parties.

Mr Robinson. — Yes.

The Tribunal here adjourned for a short time.

Mr Robinson. — I find that with regard to the four questions there was one point as to which I intended to say a word, and unintentionally omitted it, as to the second question. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain? With regard to the doctrine of acquiescence I submit it is impossible to see how it can have any application in this case. A nation or an individual cannot acquiesce in any act until it is done, and it is utterly out of the question, and inconsistent with all the facts, to say that as far as Pelagic sealing is concerned Great Britain acquiesced in anything. There was no pelagic sealing before 1867, and there was nothing therefore for Russia to prevent. What we say is, and what the facts will show beyond all question is, that Russia, after those treaties, treated Behring Sea precisely as she and all the other Powers treated all the other high seas of the world. She did not assert or exercise any jurisdiction for the purpose of preventing anything that was not prevented by other powers in any of the high seas of the world. There was a question as to whaling, and when that was objected to, and her Authorities were referred to, they said it would be inconsistent with the Treaties of 1824 and 1825 on their part to attempt to prevent it.

In short, what other Nations desired to do, in exercise of the well understood rights of nations on the high seas, they were allowed to do in Behring Sea just the same as the other nations of the world did elsewhere. Russia never interfered to prevent it.

I admit this, for I think it would be reasonable: If it could be shown that Russia with regard to Behring Sea exercised a jurisdiction and prevented certain things being done which showed by irresistible inference

that if pelagic sealing had been attempted there she would have stopped it also — then I think it could be argued with some show of reason that other Powers had acquiesced in her right to prevent it. If when they came to get what they thought was the only thing worth going for at that time, namely, whales, she had said we have jurisdiction here to prevent your coming and you must not come here to whale; under those circumstances I should have thought it would have been open to them to argue that as Russia had prevented whaling she might endeavour to prevent such operations as pelagic sealing — that is, it might to argued because she has prevented other nations from taking whales, it stands to reason if they had attempted to take seals she would have prevented that also. There would be then some ground to argue that she did exercise as to Behring Sea a sort of jurisdiction which neither she nor other nations exercised over other high seas of the world.

As a matter of fact, beyond all doubt or question, no single act of Russian can be pointed to, done by her with regard to Behring Sea, which was not done by all other nations with regard to all other oceans of the world. In other words, she permitted precisely the same rights in that sea as were open to other nations and exercised by other nations in other seas, and I do not understand how the doctrine of acquiescence, therefore, can have any application. Of course, before this Tribunal, I need not go into elementary doctrines with regard to acquiescence, such as that it implies knowledge, and you cannot acquiesce in a thing unless you know it is done. You might as will talk about a person acquiescing in the running of an electric railway, at a time when they were not known. There was no possibility of acquiescence in pelagic sealing, because it was perfectly unknown.

The **President**. — There was no prohibition against any sealing or whaling, or sea-faring industry, before the Treaty.

Mr Robinson. — None whatever.

The President. — Before or after.

Mr Robinson. — I cannot put it more strongly, or express it more emphatically, than to ask my learned friends, and indeed to challenge them, with respect to this point, to show anything that Russia did in Behring Sea which showed any peculiar or exclusive rights asserted by her over that sea.

Lord Hannen. — There was a prohibition of trading with natives.

Mr Robinson. — That was on the shore. I confine myself to maritime jurisdiction. There was a prohibition of trading with the natives, but that was what she intended to prevent, and what nations thought at that time they had a right to prevent.

The **President**. — There is no prohibition of navigation in the open sea.

Mr Robinson. — There is no prohibition of navigation in the open sea, and no prohibition of whaling or fishing of any Kind.

The President. — There was a prohibition of navigating in territorial waters.

Mr Robinson. — Yes, by the Ukase, but that was withdrawn. I am speaking now of the time after the Ukase. Between 1821 and 1867 there was no action of Russia prohibiting any action of any kind by any nation of the world in Behring Sea.

Senator Morgan. — Except trading with the natives.

Mr Robinson. — Except trading with the natives.

I do not like to repeat myself; but you will understand I am talking of trading on the high seas and maritime jurisdiction. Trading with the natives is an act done as to the coasts, not with reference to the sea.

Senator Morgan. — What reason could Russia have had for prohibiting it?

Mr Robinson. — She wished to keep the trade of the country, I suppose.

Senator Morgan. — What trade, — the fur trade?

Mr Robinson. — I cannot say, — every kind of trade.

Senator Morgan. — They had not any other that I know of.

Mr Robinson. — No; furs would be the only thing they could get from the natives, but then they would take other things to the natives, and I take it the trade was in supplying things to the natives and getting in exchange furs. That is carried on on the coast, and has nothing to do with maritime jurisdiction.

Senator Morgan. — That would depend on how it was carried on. Suppose it was in canoes?

Mr Robinson. — I do not think that that would make the least difference, because canoes must land. It is true that I may trade in a canoe; but then I must land, and I do not think, if the natives should come out within the three-mile limit in a canoe, it would make any difference, because it would be within the territorial jurisdiction.

Senator Morgan. — The general idea was that Russia asserted that they were interested in the protection of the fur-bearing animals.

Mr Robinson. — Not that I know of especially. On paper she asserted unquestionably jurisdiction; but I do not talk about what she asserted, because she asserted it for a short time, and then withdrew it. If she did not, I am wrong; but, as a matter of fact, the rights she exercised were in no sense whatever exclusive as to Behring Sea, and I do not know any instance which puts an end to that argument more thoroughly and emphatically than the fact that she was asked to stop whaling in Behring Sea, and said she could not do it, — it would be contrary to her Treaties of 1824 and 1825. I have done with that, and I am sorry I omitted it in dealing with the first four points. I only call attention to it to show that the doctrine of acquiescence has no application whatever. It may be admitted that if she had done anything which would have implied a prohibition of pelagic sealing, if it had existed and she had known of it, it would have been open to the United States to contend that she would have prevented it.

Now, I was proceeding to consider the claim of property made on the part

of the United States and the grounds on which they put it; and I have said I find a difficulty in ascertaining with satisfaction to myself whether they put their claim on municipal law or on international law, or on both. They have a right to put it on either or on any law, and in the alternative; and perhaps, therefore, it is better to discuss it without distinction. When I find, for example, that they refer to Blackstone for their propositions as they do, they are there of course claiming under municipal law; that is to say, they cite a long passage from Blackstone at page 44, and they say under that they have a right *per industriam*. That is a claim, of course, by municipal law. So I understand my learned friend Mr Phelps' Argument at page 132, where he first says that under the principles of municipal law they would have a property, but, on the the broader principles of international law their right is still more clear. There they claim it on both. They say in effect, " We have the right, in all these aspects, in the seal herd or in the industry "; and we have it under municipal law or international law, or both.

Now, what I desire to do is to call attention to the propositions which they themselves put—and I think I have referred the Tribunal to the pages at which they are found — as showing (and for that we are indebted to them) clearly and definitely the grounds on which they rest their claim to property. They are pages 47, 50, 91 and 132. I have attached great importance to these propositions as so stated, and I think they are not stated differently on these different pages, but that they substantially result in the same proposition. I attach importance to them for this reason; that I cannot but believe, looking at it as if I had drawn it myself, that those propositions are an attempt on the part of Mr Carter and Mr Phelps so to put their claims as to steer clear of all those principles of municipal law based on the analogy of other animals which they must feel had to be overcome.

We have then to ascertain — and I try first to confine myself to these claims based on municipal law—are those propositions true in fact? and if they are true in fact would they sustain the claim in law? I would desire to refer first to page 47, in which I think there is as much that is open to comment as on any other similar page in any other legal controversy that it has ever been my lot to see I refer to the printed argument of the United States. They say that according to the doctrines which they have adverted to, which are doctrines taken from Blackstone and Bracton, the essential facts which render animals.

commonly designated as wild the subjects of property, not only while in the actual custody of their masters, but also when temporarily absent there from, are. —

what they go on to state. Now I understand them to say, in substance, that what they are going to state practically renders animals which would otherwise be regarded as animals *feræ naturæ* animals of the domestic class or which have been tamed or reclaimed. I need hardly, of course, point out that there are three classes of animals — one domestic beyond doubt, which are born domestic and continue so; then there are animals

feræ naturæ, born of that nature and continuing of that nature; and then animals *feræ naturæ* which by the act and conduct of man have had their nature so changed that they have been taken out of the class of wild animals and placed in the class of domestic animals. With regard to those animals they continue in the latter class only so long as their change of nature remains. We all know this, and I do not desire to delay the Tribunal in discussing elementary matters. I only refer to it to show how I view their proposition. Now they first say—

the care and industry of man acting upon a natural disposition of the animals to return to a place of wonted resort secures their voluntary and habitual return to his custody and power.

Now let me ask, is that statement as applied to the seals founded in fact. Has it a shadow of foundation in fact? I think I may test that by this simple proposition. Is it possible to say that *you secure* a certain course of conduct by your act when, as a matter of fact, that result would have been more certainly secured, or at least as certainly secured, if you had done nothing.

Now that is putting it shortly, is it not putting it conclusively—Is there any answer to it? Can it be said that I secure something by what I do when that thing would have certainly happened if I had done nothing and had not been near the place. There is no logic in saying that a certain consequence happens from a certain cause, if the consequence would have happened without the cause. Would those seals have returned if the United States had done nothing. Does anybody doubt if? If they would, how is it possible to say that the United States have secured the return?

Now that seems a short argument; but is there any answer to it? If animals are coming, and I know they are coming, and I get out of their way when I see them coming, in order to make certain that they will come, does anything I do secure their coming except my getting out of their way? Do the United States do anything more? Is it possible to say that they do anything more? If they showed themselves visibly, the seals would not come — we all know that. So much for this assertion.

Can it be said, with any show of reason, — I do not desire to enter into nice arguments, — can it be asserted, with any shadow of reason, that they secure their return? Let me ask, if there are other seals (and the illustration has been put before), as there well may be, for our knowledge is not complete — if there are other seals which resort to other Islands not yet known, as these seals do to the Pribilof Islands, what does man do on the Pribilof Islands, to secure their return to these Islands, that is not done on the other Islands to secure their return to those Islands? If they return to those Islands by the imperious, unchangeable instincts of their nature, as they return to the Pribilof Islands, has man any share whatever in securing their return? Unless it can be answered in the affirmative, our proposition is complete. Can it be?

If man were to disappear from the face of the earth, and leave the Pribilof Islands, it would be more certain that the seals would return than it is now, because it is just possible that something done by man might frighten some of them away.

Then the next statement we have is : that man secures their voluntary and habitual return to his custody and power. When you speak of securing the voluntary return of a wild animal — and for the present I am assuming they are wild animals though I know there is an indication throughout their case that they are domestic animals, either domestic animals by nature or because they are reclaimed — but assuming for a moment they are wild animals, what is the meaning of saying that they voluntarily return to the custody of man?

It either means nothing, or it means that they knowingly return knowing that man is there and wishing to be in his custody, just as a wild animal, reclaimed and tamed by me, returns to my custody and power, because I have induced it so to do by the expectation of food or sormething else which he can get from me. Numerous instances may be put. Suppose I have on my land a den of bears or any other wild animal — I do not care whether it is bears, pheasants, or rabbits. It is very possible that the bear may be returning and that he would not return if he saw me, but does return because I keep out of his way. Can I be said to secure his return? Can I be said to secure to return of the pheasant or rabbit? Much more can it, I think, be said there, because they would not return either to the preserves where pheasants are kept, or to warrens where rabbits are kept, in some cases, unless I provided food for them.

There may be in addition other inducements, such as shelter, or some other inducement ered to return, which is offered by me. There is absolutely nothing done on the Pribilof Islands; so that when you talk of securing the voluntary return to their custody and power, it is not by acting upon their instinct. I should have perhaps referred to that first — for the proposition is that by acting on a natural disposition of the animals he secures their return. How does man act on a natural disposition of the animal at all?

Again, I put a similar proposition to what I put before. He does not act upon their natural disposition in any way. On the contrary, he abstains from interfering with their natural disposition. He leaves their disposition to its own natural operation; and because he does not interfere with its action, because he does not prevent them from acting in accordance with it, he is said to act on their natural disposition. Now, I take it that " to act upon " there means something positive, — it must mean doing something to affect their natural disposition and to influence it. What man does is carefully to avoid interfering with their natural disposition, and to have their natural disposition to its natural operation. If he did nothing, their natural disposition would secure their return. How can it be said then that he acts on their natural disposition? All that

he does is to leave it to act by itself. Then if that is correct and accurate, the proposition, be it right or wrong, sound or unsound, well founded or ill founded, is so simple, that there can be no question about it.

If I am right in saying that in neither of those cases can you say he either secures their return or acts on their natural disposition, then that proposition is not true in fact. I mean it is not supported by the facts. Man neither does act on their natural disposition nor does he secure their return to his custody and power; on the contrary, if these animals knew that they were returning to man's custody and power they would not return. If the wild animal who comes on my land, to his den, knew I was there he would not return. It is because he does not know I am there that he does return; and if I were to show myself he would not return. How then can I be said, in any reasonable sense or use of language, either to act on their natural disposition, or to secure their return? If we are right it is impossible to assert that either of these things is done in the case of the seal; and, of course, the natural inference must be that this proposition is not supported in its application to these animals by the actual facts of the case; and if falls, therefore, without reference to law, because we have not the facts to which to apply the law.

Then it is said that having acted upon their disposition so as by that means to secure their return, it is done "so as to enable him to deal with them in a similar manner, and to obtain from them similar benefits, as in the case of domestic animals:" It is "the nature and habits of the animal which enable man by the practice of art, care, and industry to bring about these useful results that constitute the foundation upon which the law makes its award of property."

Now I venture to think, first, that he does not act on these natural instincts at all: and next, that if he did act on them, he would be doing only what every hunter does in the pursuit of wild game; and what is the invariable course pursued by all people who wish to get wild animals within their power; in other words, what are the invariable devices of the hunter? I can conceive many cases in which man does act on the natural instinct of wild animals, and in which he secures their return, or in which he secures their coming and submitting themselves to his power. I will take an ordinary case and put the illustration — I do not wish by any means to be extreme. The natural instinct of the wild duck is to light with its fellows. I act on this instinct by putting dummy fellows on the water, and I hide behind something to get out of the way. I am acting on their instinct there, so as to induce them voluntarily to come to the decoys and submit themselves to my power, and when they get within range I shoot them, and secure the useful result. Is not that the case with every wild animal? — I do not care what it is — I do not care whether is the case of ducks and putting out decoys, or the case of wild animals and putting out food for them — I do not care in what case you do it — it is just the ordinary device of the hunter to get the animals to voluntarily submit themselves to his power, and to come to

the place where he can exercise power over them. Take the case of wild geese, which has been referred to. It may be said, there truly that man acts on their instinct. He imitates the call of their mates, and spreads food, and endeavours by every possible means to induce them to voluntarily submit themselves to his power and control; and if they do submit themselves to his control to such an extent as to come within range, so as to enable him to secure them, he does secure them, and with them the useful result.

But is there any result which the United States obtain here except the result of getting the animals' skins? — of being able to kill them and securing the produce? That, I venture to think, is the only useful result, if it can be called a useful result; and that useful result he does not obtain either by anything he secures or by any acting on their instinct. If, then, he does neither of those things, how can it be said, as it is said in the conclusion of that sentence, that it is the practice of art, care and industry on the part of man, which brings about useful results? What " art " does he practise, except that art which a hunter practises to deceive and delude wild animals? What industry does he practise except the industry of killing them and selling their skins? Is not every single element in that proposition unfounded in fact? If it be unfounded in fact, then it is unnecessary to discuss how for the law has any application to it.

I myself do not believe, or rather I submit that you cannot make out — unless these animals are domestic animals, which I shall speak of hereafter — that if all these things were done which it is argued would give property, there is any law to warrant such inference. Suppose they are wild animals — I am assuming, of course, all along, that they retain that class still and have not changed or been diverted from it by any act on the part of man — it they are wild animals, aud if, as a matter of fact, man does act on their natural disposition to secure their voluntary return — it cannot be voluntary because if they knew he was there they would not come back — but if be secures their habitual return to his custody and power, so as to make the same use of it as in the case of domestic animals, so as kill and eat them or sell them, and thus secure the useful result — if he does all that, what does he do with regard to the seals that the hunter does not do in the case of every other wild animal. He acts on their instinct and so secures their return, and obtains the useful result. I submit therefore that it is indifferent whether these facts which are here stated are true as facts, which I have endeavored to show that they are not, or whether they are not true. If they are true as facts we submit there is no law which, by reason of them, gives any property in the people who practise these arts.

My friend says this species of property is well described as property *per industriam.* Now you have only to read Blackstone or Bracton, or any other authority on the subject, and you will see that *industria* as there described is of a wholly different character.

Perhaps I may as well say here that it is difficult to conduct an argument of this sort in any sort of order; and there is a matter which may come in now well as at any other stage, a matter which has been already referred to : namely *animus revertendi*, and the application which, in my view, it has to this case. I submit as an incontestable proposition of law that it has no application whatever to this case, unless these animals are tame and reclaimed; and then it can have no application unless there has been previous possession taken of them; and then that its only application, purpose or value, is as an item of evidence tending to show that they have been reclaimed; and as a necessary consequence from that, that it has no application whatever unless this *animus revertendi* is produced by the act of man.

Now, let us see whether that is a correct statement of the law. In the first place, in the case of domestic animals, *animus revertendi* has no application and no place at all, because it is not wanted. It makes no possible difference, if my horse or cow strays, whether they have the *animus revertendi* or not. They are my property wherever they go to, wherever I can follow them, and wherever I can find them. If a horse or a cow strays, it is often because of the instinct to get back to some place with which he is better acquainted, and in which he has lived longer. In the case of wild animals, it is has no application, for a totally different reason. It is absolutely useless, and has no value as indicating or rather tending to prove property. A rabbit which leaves my warren and a pheasant which leaves my preserve have, unquestionably, *animus revertendi*; but that does not give me property in them. My rabbit may leave its burrow on my land, and may cross the boundary to my next neighbour, and while I am looking at it he may shoot it. I may protest against it, or beg him not to. "I may tell him", That animal has just left my land — it has got young on my land and will return to them : leave him alone. "My neighbour may say, "I am very sorry; but he is on my land and I am going to shoot him." He may shoot him and appropriate him, I and have no sort of recourse. There is nothing clearer there than the *animus revertendi*. He does not deny it; he is not concerned to deny it, but he simply says, "Here is a wild animal on my land : if I can appropriate him to myself, I have a right to do it; and I am going to do it. Your protestations have no force or value whatever. The law is on my side, and I am going to take advantage of my rights under the law". I believe that is a proposition which nobody having looked into the subject will attempt to dispute.

If then *animus revertendi* has no application to either of those two classes, the only one remaining is those animals which, being born *feræ naturæ*, have become by the act of man so tamed or reclaimed that they have passed from the class of wild animals into that of domestic animals. And then, if you desire to prove that though once wild they have now become reclaimed, if you can show that they have a disposition to return and that that disposition to return was created by you, it might

have some force and value as a piece of evidence to show reclamation and taming; otherwise it has none.—

Take this simple instance. I catch a fox, or any other wild animal, I do not care what, and having got him I keep him for a day and let him go. He goes, and in his first instant of fright leaves my territory. Beyond all question he is going to return? He is going to return because he has got his home on my land and is accustomed to it, or he has got young on my land and natural instinct prompts him to return. But that has no weight or efficacy in enabling me to claim property in him, simply because I had nothing to do with producing it. If, on the other hand, I have kept a wild animal so long that by feeding it and taming it, or by confining it, when it leaves my place it intends to return, not in obedience to any instinct produced by nature, but in consequence of what I have done to it, and it desires to return to me for the purpose of protection or feeding, or whatever it may be which it is accustomed to get from me, then I can point to that *animus revertendi* as evidence to show that I have reclaimed that animal, and that it has passed from the category of wild animals into that of tame.

But, in order to pass from one class into another, there must be a change in the animal's nature; — that is the whole story. There must be a change in the nature of the animal, a change to the nature of a domestic animal; and that change must have been wrought in it by man. Now, let us apply that to the seals. Can anyone pretend to say for an instant that any change in the nature of these seals, good, bad or indifferent, of any sort or kind has been produced by man? In what respect do the seals frequenting an uninhabited Island, — an island never yet discovered, or an island discovered, say, a week ago or a month ago, — in what respect do the habits and nature of those seals differ from the nature of the seals on the Pribilof Islands?

Unless it can be pointed out that there is some change in the nature of the animal which attaches and belongs to the seals of the Pribilof Islands, as opposed to the seals of the other islands that I have referred to, then it cannot be said that there is any change, or that the United States have produced any change; and the animal remains just as it was, a wild animal.

Senator Morgan. — But you would not insist, I suppose, that the change in the nature of the animal from domestic to wild, when brought about by the interference of man, would give a right of property to any one who might capture it, as *res nullius*; as, for instance, if a man has a colt on his land, and by harsh treatment or in some other way alarms it so that it becomes as wild as a deer, he still would not have lost his property.

Mr Robinson. — If I were to attempt, with deference, to answer that question, I should have to go back into speculation with reference to the nature and habits of animals which are hardly worth reverting to. I beheve one great writer has said that all animals originally were domes-

tic, and that those that are wild have been rendered so simply by the brutality of man.

Senator Morgan. — But if you are right that a wild animal can be tamed, and becomes property because you have rendered it tame by kindness, cannot you turn a tame animal into an animal *feræ naturæ* by reason of your harsh treatment?

Mr Robinson. — I must confess that I have never thought of considering that question as it could not possibly arise. At the same time I do not believe that I can make my cow a wild animal by any amount of brutality.

Senator Morgan. — I should think not myself.

Mr Robinson. — And, further, I do not believe that any law can be found to say so; but I can make a wild animal a tame animal, and there is abundant law for that. There are many cases where we find the law laid down as unquestionable, or at all events where has not been questioned, and in such cases I do not trouble myself to hunt out whether the converse is true, or upon what the law stands, because I know that it is the law.

Senator Morgan. — If the dominion over it is the same without cultivation as with, it seems to me it makes no difference.

Mr Robinson. — Yes, but I understand that what you suggest is a speculative view. You certainly can make a wild animal a tame one; but with reference to making a tame one wild, I can only say that the law does not allow it. I never heard of a law that allows it, and never heard of a wild horse that once was a tame horse, or of a wild cow that once was a tame cow. I do not think the thing is possible. That is all that can be said.

With great deference, one could suggest excellent and natural reasons for it. I do not think a man who has bought a valuable animal and paid a large price for it lose his property in it simply because he treats it brutally and creates an aversion in the animal to him, and it therefore, becomes ferocious. We know that some horses are very dangerous, so in the case of Texas steers which occasionally roam the Streets of New York and frequently do damage, but I never heard that they were wild animals, though they are infinitely more dangerous and destructive than many. I can say nothing more as to that. With regard to the question you have put to me I reply there is no possibility in law of making a tame animal wild, while it is clearly possible to make a wild one tame. That is the only answer that I can give.

Then again, let me put what has been put by my learned friends within a very short time, and which I only advert to for the sake of a few remarks. What would be the result of this property being in the United States? They claim the finding that these seals are the property of the United States, which must mean that it is prohibited to all persons to destroy them.

I seldom venture to prophesy, and, I should not dream of doing it

now if I were not prophesying in the Company of a person in whom I have the confidence that I have in Senator Morgan; but a speech of his was read here says some time ago in which he says that the Pacific fisheries are destined to become more important than the Atlantic. For myself, having been to that coast several times, I may say that I think they will, and may become so in a shorter time than people who have never seen that part of the country are inclined to believe. When they do become of importance the seals in all probability will go, and no laws will save them, for the reason that public opinion will be against them. Whenever the seals come into conflict with the food fishes in that part of the world the fate of the seals is decreed; no regulations, no laws, no statutes, will ever be available or effectual to save them.

The President. — Perhaps you will have to consider that feature of the case on the question of Regulations?

Mr Robinson. — I am bringing it to the attention of the Tribunal for that simple reason. It was well said, I forget by whom, that laws were like water, they could never rise higher than their source, that source being public opinion; and it makes no difference what Statutes are on the Statute-book, or what is the municipal law of any country. If that law has for its object to protect seals as against a food fish, in that part of the country the law, cannot be enforced because public opinion will be against it.

What is the effect of what our friends are asking this Tribunal to declare? That these seals are their property? It is quite impossible, if they are their property, to get rid of the effect of that finding, because they are their property wherever they go and whatever they are doing. No man has a right to destroy them. He must answer to their owners if he does. Now, if they should become injurious to the fisheries industry as they possibly may — and I say possibly because, confident as I am of the prediction alluded to, it is still only a possibility — we know that the canning industries are enormous and are growing year by year; and we know that the seals feed and feed in increasing quantities upon the fish which support those industries. Now, suppose the seals should gather at the mouth of the Fraser, where some of these largest Canneries are, as it is only natural they should; and, as the salmon close in to go up the River the seals should also close in and destroy them?

Senator Morgan. — Is there any evidence that they have ever done so?

Mr Robinson. — There is evidence that they follow the fish.

Senator Morgan. — But I am talking of the Salmon Fisheries at the mouth of the Fraser River, or any other River?

Mr Robinson. — If you ask me, if I have any evidence that, because salmon have collected at the mouth of the Fraser, therefore seals have, I cannot say that I have. But I am content to ask any member of the Tribunal if that is not to be apprehended.

Senator Morgan. — I merely enquired if there was any evidence of it?

Mr Robinson. — No; there is none.

The President. — Where is the Fraser River?

Mr Robinson. — It is 6 or 8 miles to the north of Vancouver, near the line of the boundary.

General Foster. — That is an interior water.

Mr Robinson. — Yes; it is an interior water.

The President. — Near to the line, of course, taken by the seals?

General Foster. — And it empties into an interior water.

Mr Robinson. — Yes, just where the seals would come.

General Foster. — No; that is why I make the point, it empties into an interior water.

Mr Tupper. — Which connects with the Pacific Ocean.

Mr Robinson. — At all events, I accept that statement. I know the Fraser very well and have been up it some distance.

The President. — Is it the mouth of a channel?

Mr Robinson. — It empties into one of those channels; but, if General Foster has been there, I have nothing to say. I have been there, and have seen the month of the Fraser; and, if I was asked where it emptied itself, I should have said it emptied into the sea.

The President. — If you have both been there and cannot agree upon the facts, how shall *we* get on?

General Foster. — We are really both agreed.

Mr Robinson. — At all events, let me take the Skena, which is a British Columbian river. If the Fraser does not empty itself into the Ocean, it would make no difference, as we know from the evidence that seals follow the fish into interior waters, and I have read evidence and can point it out that they are found in interior waters following the salmon and schools of fish, ———

Lord Hannen. — Is there any evidence that they follow them up the Rivers?

Mr Robinson. — I believe not.

Senator Morgan. — In San Juan de Fuca they pass in. Would it incommode you, Mr Robinson, if I asked you a question for my own information?

Mr Robinson. — Indeed, it would not, Sir.

Senator Morgan. — I wish to know what you call interior waters are those lying behind Vancouver Island and along the coast, — are they navigable waters?

Mr Robinson. — Yes.

Senator Morgan. — Are they navigated by the ships of the world?

Mr Robinson. — Yes.

Senator Morgan. — Going up and down the coasts of British Possessions and Alaskan Possessions?

Mr Robinson. — Yes. You probably know this, that there is regular navigation between Victoria and Vancouver, and that is Inland Waters. It is an archipelago of Islands. I have been there, and can speak to that. If you turn and look on the Map, you will see it in a moment.

Senator Morgan. — Those waters lie between the Islands and the main Continents, and are navigable waters?

Mr Robinson. — Oh! yes, I think so.

Mr Tupper. — It is a Steamer route.

Mr Robinson. — It is the popular tourist route from Victoria and San Francisco. In point of fact it runs along that archipelago, and that forms the attraction of the route. It is one of the peculiarities of that coast from Vancouver to San Francisco, if I am not mistaken, that it is an open coast devoid of islands or harbours, but from Vancouver north it is a continual archipelago. It would make no difference in my argument whether the seals come into the interior waters to get the salmon as they are preparing to pass up the Fraser or into the ocean — I had, perhaps, better take the Skena in British Columbia, which I believe passes into open water. I have not spoken of it before, and I do not speak of it positively, but I know a canning industry is carried on, and that the salmon brought from the Skena — which is another illustration of some interesting statistics that my friends have stated — is said to be of a finer character than the salmon that come from the lower waters. When speaking of canned salmon I have heard it said, "Get it from the Skena". Then take that river. Suppose the seals collected there to prey on the salmon, and seriously to interfere with the canning industry, as they will do if your view, sir, should be sustained, as it may be in a short time — probably in our time and before very long — that those fisheries will become of immense importance: on that day those seals will be doomed. They will have no friends. Public opinion will be against them, and they will be exterminated. Is it possible that an animal as to which that can be said with truth can be the property of an individual so that he can own it wherever it goes and be entitled to protect it?

When we add to that what is not improbable, — for we know, that sealskins, which are an article of luxury and taste, may diminish in value, that the taste for them may diminish, and that the seal industry would then be of little importance and yield little return, and might not be worth carrying on, while the industry connected with the food fish must be of increasing importance, and of enormous value, and of absolute necessity to the population as a means of subsistence — when we say that that may happen, how is it possible to talk of protecting the seals, not now, but for all time, by giving them as property to any particular nation or individuals. The thing is impossible, because it would be contrary to every interest of the world, and to every reasonable principle.

Therefore I say that that forms another reason why this claim of property is not possible on reasonable grounds. I am not going now into nice principles of law or citations of authority. I am talking to reasonable men; and on reasonable principles I ask is it possible to assign any property in these animals that will give a right to protect them irrespective of the circumstances, as they may change from time to time, and as the interest of the world may require them to change? If not, it

is not possible to assign property in these se als to any particular nation or to any particular individual.

If I were to ask any ordinary person what the seal is — and I am recurring for a moment to its character in natural History — what is a seal? I think the answer would be without question that it is a marine animal, a free swimming animal of the Ocean, and the property of anybody who can take it.

But if we ask my learned friends here what is the Alaskan fur-seal, the answer is that the Alaskan fur-seal is a terrestrial domestic animal and belongs to the Government of the United States.

Now for what reason or on what ground is it that the fur-seal of Alaska differs from all other fur-seals of the world which have yet been discovered, because that is the result of the definition now assigned to them, that they are terrestrial and domestic animals and the property of the United States, the ordinary fur-seals and hair-seals all over the would being marine animals according to the classification of all Naturalists, and animals *feræ naturæ* belonging to nobody?

While I am at that point I may ask — a question which has always been to me one of doubt and perplexity. It is not of great importance, and my learned friends may therefore — perhaps I should not say "therefore", because I believe they would do so whether it was of great importance or not — endeavour to clear it up for me. I find in the United Case at pages 295 and 296 as one of the propositions which they say they have established, that it never mingles with other herds. At page 295 they say that the Alaskan fur-seal is essentially a land animal, and then I find on the next page it is said it never mingles with any other herd, and the identity of each individual seal when in the water can be established with certainty. I really do not know what is the meaning of that assertion. I have seen seals in the water, and how it is possible for anybody to say that at all times, when in the water, the identity of each individual seal can be established with certainty, I have been unable to understand. I do not think it is of great importance what is meant by it, but how the statement came into the case, and how it is to be supported, I do not know.

If you knew each seal, as the President once suggested, as the shepherd knows his sheep, in the millions, it would be impossible to tell them individually, even if you were alongside of them, and I do not know why that allegation is put in or what is the meaning of it. I thought it meant the identity of each seal-herd; but even then it would be wrong, unless it means that it can be established with certainty by reason of its position and locality. If they mean to say the identity of each seal-herd can be established, because you only find one herd on the eastern coast and the other on the west.

Lord Hannen. — That is the meaning of it, I think. It says it never mingles with any other herd.

Mr Robinson. — That probably may be so.

Lord Hannen. — It means the identity of seals belonging to each herd.

Mr Robinson. — Yes, that is the only construction that can be put upon it; but it is certainly not put plainly. I know it has struck others besides myself, and I mentioned it, because I have not known what was intended by it.

Then, further, with regard to its domestic nature, one thing is absolutely certain, if you look at our Counter Case. I do not delay to read extracts, but at page 113, there are numerous extracts which show that the seal is an animal very easily frightened and terrified, and is subject to what we call stampedes. There are numerous extracts given there which show it is a timid animal.

I need not stop to read the extracts, nor to insist upon the proof, for we have it in evidence that all precautions are taken by the United States upon the Islands for the purpose of keeping men out of their sight, and of not going near them, not frightening them, not terrifying them; they will not allow men to smoke; they will not allow them to whistle; they will not allow a noise; they will not allow dogs — every possible precaution is taken to avoid frightening the seals or acting upon their peculiar sensibility and timidity.

In addition to that, how can you call an animal a domestic animal when it is beyond all question that for eight months of the year it disappears altogether; its master cannot follow it, or identify it; its master does not know where it is; and it would die if it remained with him? If they, here again, insist on the *animus revertendi* at the end of that time, I would say, what probably I should have better put in its proper place, there is no instance I know of in which the migratory instinct of returning to any place has been relied upon as *animus revertendi* tending to enable a person to acquire the right of property, or where it has been called the *animus revertendi* to which the law applies. If there be *animus revertendi*, what has puzzled me in this case, and I should like very much to see if it can be answered satisfactorily, is, who has the best right to claim the *animus revertendi*. The nations who are all interested in the Pacific Ocean may say they have the *animus revertendi* to the Ocean, imperious and unchangeable, — more imperious and more unchangeable than to the Pribilof Islands, for this reason : if the Pribilof Islands were submerged the seals would find another place, — I do not think anybody doubts that, though in my learned friends' Case it may be doubted, — but I do not doubt that if the Pribilof islands were tomorrow submerged these seals would find some other place to haul up and breed on, while if anything happened to the Pacific Ocean those seals must die. They must feed; they must go out to the sea and cannot remain on the Islands. Then I put myself in the position of a person interested in pelagic sealing in the Pacific Ocean, or a nation interested, — all rights being equal among us. They may " when those seals leave us they must come back to the Ocean by the imperious instincts of their nature,

and not only that but all the food they get they get in the Ocean, and not only that but they would die if they did not come back to the Ocean. If *animus revertendi* has any application at all, why cannot it be claimed as much at one end as at the other? "

Take the ducks, take the geese, the northern ducks, as we know being bred, many of them, within the Arctic Circle. They have the *animus revertendi* there, and the Esquimaux may claim them because they come there to breed and have the *animus revertendi*.

The President. — Would you not make any difference between the *animus revertendi* to a place which is the property of a nation and the *animus revertendi* to the ocean, which belongs to nobody?

Mr Robinson. — None that I can see. I had thought of that, Mr President, but there is not — I speak, of course, subject to correction if any difference should occur to you — I am not aware that there is anything that can make any difference in the principle. The learned President of course understands what I mean. I mean for the purpose of giving property I am not able to see any difference. There is a distinction I not a difference.

The President. — I merely inquired what was in your mind.

Mr Robinson. — There is a distinction; but is it a distinction which makes a difference in legal principle? I have not been able to see that it can be so.

So, then, the *animus revertendi*, I submit, is out of the question. We now come to another subject. I have endeavored so far as I am able to discuss this question upon the principles of municipal law which they say apply to it, and which they say distinguish it from all other animals *feræ naturæ*, which they say make it a domestic animal; and if it is to be a domestic animal I venture to say that it must be a domestic animal by its nature. I have had this difficulty also, that in some parts of my learned friends' argument I find statements from which I should gather that they claim it to be a domestic animal by nature, and in others I find statements which go to show that their argument is that it is a domestic animal made so by them, although a wild animal originally. One thing I think is clear, that unless it is a domestic animal by nature they certainly have not made it one; and I think they are driven back in some portions of their argument.

Lord Hannen. — What is a domestic animal by nature?

Mr Robinson. — I can say nothing more than it is a domestic animal by nature. I hardly know how to describe it, except that I would say that it is an animal which has a domestic nature. Lord Hannen will remember the question that was once asked, what was an archdeacon, and it was said he was a person who performed archdiaconal functions. I really do not know that I can say what is a domestic animal by nature, except by saying it is what we recognize as such.

Lord Hannen. — You seemed to be relying on the distinction, and therefore I wanted to know what you meant.

Mr Robinson. — If Lord Hannen asks me my opinion I can say at once that I think there is a plain distinction between an animal which is a domestic animal by nature and an animal which has been temporarily brought within the class of domestic animals by reason of the industry or art of man exercised upon it.

There is just this difference : That a domestic animal proper remains a domestic animal forever, and must remain a domestic animal forever; it was born so, and must die so; but an animal that has been tamed and reclaimed belongs to the class of domestic animals only so long as it retains that nature. If that animal should escape and regains its wild nature then it relapses into the class of wild animals.

The President. — Do you regard the bee as a reclaimed animal or as a domestic animal?

Mr Robinson. — I should say when the bee is hived and reclaimed, as they put it, then it would be a reclaimed animal. You get your property in bees, as Bracton says, by reason of occupation and hiving. If that occupation and hiving has been such as to give you a property, it is because you have reclaimed it.

The President. — Then the bee, you think, is an animal *feræ naturæ*?

Mr Robnison. — I should say it was originally a wild animal, but when you come to hive them and confine them, you make them for the time tame. That is you bring them into that class.

The President. — The reclaiming is the hiving?

Mr Robinson. — The reclaiming is the hiving and confining. Yes, sir.

The President. — Confining?

Mr Robinson. — Confining it in the hive. I will not say confining, because it is perhaps hardly a proper expression to be used.

Lord Hannen. — Homing.

Mr Robinson. — Homing; yes sir. Of course you have the power of confining them, as my learned friends say.

The President. — Putting them into the hive.

Mr Robinson. — Putting them in the hive, and their coming back to the hive and living in the hive, and your providing shelter, food, etc. If it comes within any of those classes it must come within the class of reclaimed animals. That is to say it is temporarily in that class. I do not know how else I can put it. I may say that there was a case reported only the other day — possibly it may have attracted the attention of some members of the Tribunal — in which the question of the length of time that is necessary to confine a wild animal in order to bring it in that class came up. It is perhaps known to some of the Tribunal that there is a law in England for the prevention of cruelty to domestic animals; and the Humane Society proceeded against persons who were carrying on in some of the northern counties the game of rabbit coursing. It was said that these rabbits had been kept for a week or ten

days in confinement prior to turning them out to course, and that they had thereby become domestic animals. Mr Justice Wright held that he could not possibly say that that made them domestic animals; and the paper, which seemed to agree with that, said they feared there was no doubt that the decision was correct, but they wished it could be otherwise.

The President. — Do you think a hived bee would fall under that law?

Lord Hannen. — I do not think cruelty to animals is extended to bees.

Mr Robinson. — I do not think it is; though I am afraid they are subject to a great deal of cruelty very often in order to get at their honey.

I pass then to those propositions which my learned friends assert are founded either on international law or the law of nature; and so far as I can understand they are the same. I find that what my learned friends assert in substance, if I can properly state it in substance, is that international law is founded upon the law of nature. Differing from the view of the learned Attorney General, they say that whatever part of the law of nature is not rejected in international law may fairly be presumed to be assented to, and therefore that anything they can say comes within the law of nature, if you cannot discover that international law has rejected it or dissented from it, forms part of international law. I venture to say that is contrary to all theories upon which international law has hitherto been founded. But we may at all events take for a moment the different propositions which they found upon that. They go at great length into a discussion or disquisition of the original principles and foundation of the institution of property, from which they deduce certain principles. I can only say of those principles that they find no place in the municipal law of any portion of the civilized world. They may be valuable abstract discussions. They may be very useful speculative theories for the guidance and assistance of those who are making laws, in order to decide how far it is advisable, how far it is practicable, to make their municipal law conform to them; in other words, how much of the principles laid down and enunciated by these authors as part of what they are pleased to term the law of nature, it is practicable or useful or desirable to incorporate into their municipal law. For any other purpose I venture to say that they are absolutely useless, because not only are they not founded on any positive system of either municipal or international law, but they are theories which it would be utterly impossible to incorporate into any system of laws with a view to carrying them out.

Let me for a moment turn to the first assertion which is made — and I think it is perhaps a typical assertion — with regard to this property, founded upon that law. They assert that they are trustees: That this property is not their own, that they are trustees of it for the civilized world, and are conferring upon the civilized world the blessings which sealskins will inevitably bring to those who can afford to buy them; and they say that that is an obligatory trust. My learned friends differ about that however; and I do not wonder they differ about it. My learned friend Mr Carter, at one

page which has been pointed out, asked if anybody can doubt that it is an obligatory trust; if it can be doubted that, if a nation having that trust incumbent upon it were unfaithful to it, other nations could intervene and depose the unfaithful trustee. My learned friend Mr Phelps, as I understand, founds to a certain extent, though I am quite free to admit more guardedly and cautiously, his claim to property upon that theory. He says that if the only object of the United States in keeping this property is to allow pelagic sealing to exterminate it, of course they are free to destroy it, and that their abstinence therefore entitles them to a property. There is another place where I had found an extract in which it was said they had a right to destroy it. I must look for that again, for I have not the reference just now. But at all events there is that difference of opinion.

After stating that, they state that self-interest is a sure guarantee for the performance of those trust obligations. They say that that trust extends to the means and capabilities of a nation for production, and that those who are wronged by a breach of it have a right to redress the wrong, which would be nothing but a removal of the unfaithful trustee. Then they go on to add that this fundamental truth, that this useful race is the property of mankind, is not changed by the circumstance that the custody and defence of it have fallen to the United States, and if the world has a right (as it certainly has) to call on the United States to make its benefits available, they must clothe then with the requisite pover.

Now in discussing this question I would like to say, first, from what point of view I approach the discussion of any question of trusts. I know nothing whatever of trusts except what I find laid down in certain treatises in America and in England. There are treatises of acknowledged authority on that subject both on the other side of the water and on this side.

Before I proceed I should like to recur a moment to another matter. I find at page 554 that Mr Coudert, in arguing as to the question of property, unfortunately forgot himself, or at all events he stated views which were diametrically opposed, as I understand it, to his colleagues. He says :

> To put an extreme case, suppose it were deemed important by the United States to kill every seal upon those islands, what nation in the world would have a right to find any fault? What nation in the, world would say if it were deemed good policy, — if it were advantageons to us — if there were a profit in it — would any nation have a right to say that it is not our property, and we have not a right to kill them for our useful purposes ? I take it that the best test of an exclusive property right is the question whether or not any other human being has a right to interfere.

You can reconcile that to a certain extent with what is said in Mr Phelps' argument, but you cannot reconcile it Mr Carter's argument. My learned friend Mr Coudert, I know, ought to have followed one of my learned friends or the other; but my own interpretation is that he was not thinking at the moment of making his choice. He was surprised for the moment into assuming the position of a lawyer.

I think he forgot for the moment that he was arguing theoretical and metaphysical questions; that his old training returned to him, and he enunciated ordinary common sense law for a moment. I think that is the explanation of Mr Coudert's unconsciously asserting a doctrine so diametrically opposed to the arguments of my learned friends, but so useful for his then immediate purpose. When a lawyer trained in the doctrines of the common law and municipal law is discussing a question of property, and is told that it must be discussed not upon principles which he finds laid down in any system of law, but upon abstract theoretical propositions not of what the law is, but what it ought to be, and those are the propositions he is endeavoring to support, he is very apt indeed to forget himself, and to say. "Surely I have a right to destroy these things: they are in my power. Who could interfere with me, if I chose to destroy them all? Is not that the best proof that they belong to me?" I think Mr Coudert forgot for the moment the propositions which it was his purpose to support. But however that may be, and founding my knowledge of trusts upon nothing in the world but upon those treatises which I have referred to, let us make those few inquiries which every one would make when he was told that a trust was asserted and was denied. I think the questions would naturally occur to him, How was the trustee appointed? What is the nature of the trust which he is to perform? How is the performance of that trust to be enforced?

Now then, let us see how this trustee is appointed. Who are the *cestuis que trusts*. Who appointed the United States trustees of these seal islands? At page 137 it is said that the interest of Great Britain in the preservation of the seal herd is almost as great as that of the United States. Great Britain, then, is one of the most influential of the *cestuis que trustent*. But great Britain is here objecting to the assumption of this office of trusteeship by the United States. Great Britain says, "If I have any interest in this seal herd — and I either have or have not — I am of age, and I wish to manage my own property for myself". On what principle is she not to do it? We are talking now about trusteeship. The other nations of the world, so far as we know, have neither assented to nor dissented from the assumption of this trusteeship on the part of the owners of the islands. Then, what is the next thing to be considered. Who are the trustees? They are the persons who have the largest interest, beyond question, in the trust property, and their interest is diametrically opposed to that of the persons holding the next largest interest, for whom they appoint themselves trustees. It is contrary to all one's ordinary notions that they should be the trustees appointed; because their interest and the interest of the *cestui que trustent* do not concur.

Then let us ask what is the nature of this trust? The trust is to sell the trust property to the *cestuis que trustent* at a price to be fixed by the trustees. Can you conceive a trust like that? I may be a trust according to the law of nature; it may be a trust according to international

law; but is it a trust according to any other law that any lawyer ever heard of?

Senator Morgan. — *Trust in invitum.* What is that?

Mr Robinson. — I hardly know. If you will explain what you mean by a *trust in invitum.* I am not quite sure what you have in your mind.

Senator Morgan. — A trust imposed upon a man by the attitude that he holds to a particular piece of property.

Mr Robinson. — Yes; there may be such a thing.

Senator Morgan. — Of course there is.

Mr Robinson. — Yes; I should say there is; but I am not aware of any instance in which there is any trust even in the remotest degree approaching this trust. I am quite aware that a man could hold some property which would make him a trustee, and I am also aware, as a general rule, that people would rather not be trustees; but I do not understand a trust, the nature of which trust is to sell the property to the *cestuis que trust*, and to fix your own price upon it. Then it is not a price, recollect, to be regulated by what it may cost the trustee for the performance of his trust, what it may cost him out of pocket, or for his time required to perform the duties of the trust. On the contrary, I find in Mr Palmer's letter that 18 months before he wrote, it was generally supposed this property would pay to the trustees an interest on the outlay of two thousand per cent.

Now, under these circumstances, is it any wonder that other nations, contrary to all the usual rule in trusts — because if there is one thing better known about trusts than another, it is that a trust is said to be an onerous and thankless office, which everyone is unwilling to undertake, und which everybody is anxious to escape from — surely it is no wonder that the other nations of the world, and England in particular, are very anxious to range themselves among the trustees in this case, rather than to be numbered among the *cestuis que trust.* It is a very unusual case, but it is the case here. England says, " I would rather help you in discharging the benefits of this trust to the world. I would infinitely rather assist you and be trustee, than retain the position which you are good enough to assign me of *cestui que trust.* " Is there any reason why she should not do it?

However this may present itself, in whatever almost ludicrous aspect, is there anything contrary to the facts? Is not that the exact nature of the trust which the United States are assuming; and they are assuming that trust upon the plea that they are conferring blessings upon mankind. This is certainly the most attractive form of philanthropy ever heard of, and all men would be very glad to practice it if they only could get the opportunity. To assume the trusteeship of a property out of which you make a thousand per cent, and have at the same time the blessing of an approving conscience and the satisfaction of conferring blessings on the world, is a thing very desirable, if it can be attained

by law. But it is no wonder that other nations think that this trusteeship, so peculiar in its character, and peculiar in its benefits, should not be altogether assumed by the United States.

Then how is the performance of this trust to be enforced? It is carefully stated that it is beyond question. Perhaps I had better read that sentence, because I do not wish to over-state or under-state anything. At page 92 of the United States Argument, it is said:

> It is in the highest and truest sense a trust for the benefit of mankind. The United States acknowledge the trust and have hitherto discharged it. Can anything be clearer as a moral, and under natural laws, a legal obligation than the duty of other nations to refrain from any action wich will prevent or impede the performance of that trust?

At page 59 the same subject is recurred to, and at page 61 it is said:

> "It is the characteristic of a trust that it is obligatory, and that in case of a refused or neglect to perform it, such performance may be compelled, or the trustee removed and a more worthy custodian select as the depositary of the trust."

Now, let me ask in all seriousness — for that must be meant seriously or it is not meant at all — supposing Great Britain, as the most largely interested of the *cestuis que trusts*, should believe, and have good reason to believe, that the United States were unfaithful trustees; that they were wasting the trust property; that they were mismanaging it; that they were not conferring the blessings upon Great Britain in particular — for I do not think she would trouble herself much abnit the rest of the world — which she had a right to obtain from it; and supposing she were to say to the United States, "We desire to remove you; you have been unfaithful to your trust; we propose to take possession of the Pribilof Islands, and put in a trustee who will manage them better": could any body doubt for a moment how the proposal would be received! Do you think there would be any arbitration about that? Do yon think there would be met in any way but at the cannon's mouth, in an attempt to compel the performance of that trust; and is it really possible seriously to discuss this question, — how can the existence of a trust in this case be made conform to any known system of law or to any ordinary rules of common sense?

There are other propositions connected with this matter, which it will not take any great length of time to discuss, but which, as it is now 4 o'clock, had perhaps better be postponed until tomorow.

Mr Carter. — Mr President, before the Tribunal separates I will give the reference which Lord Hannen, I think, asked for, as to the statutes conferring jurisdiction upon the United States Court of Alaska:

> The act providing Civil Government for Alaska, which is contained in volume I, page 481, of the Supplement to the United States Revised Statutes is a special act, and section 3 is as follows:
>
> Sec. 3. That there shall be, and hereby is, established, a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States

exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with the act, as may be established by law.

It will be perceived that it refers to the jurisdiction of the district courts as the measure of the jurisdiction which it possesses.

Then the United States Revised Statutes, section 563, is a follows:

The district court shall have jurisdiction as follows :

Quite a number of cases are mentioned, among which is.

Eighth. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; and of all seizures on land and on waters not within admiralty and maritime jurisdiction. And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts. (And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in paragraph six of section six hundred and twenty-nine.)

I should say that that paragraph refers to cases where prizes are made in consequence of any insurrection in the United States — a recent amendment, not particulary applicable.

Sir Richard Webster. — Would Mr Carter kindly let us have the book, in order that we may look at it. I mean to say I should like to follow it out. It seems to me as though that was giving what we should call jurisdiction *in rem* and jurisdiction *in personam*, and that it was not made a prize court in the sense in which we have been using the expression.

Mr Carter. — The paper is here, Sir Richard.

Sir Richard Webster. — It had better appear upon the note. It will go upon the note, and I will see it.

The President. — The Tribunal will meet tomorrow at 11 o'clock for private consultation; and at the issue of the private consultation the public hearing will begin.

[The Tribunal accordingly adjourned until Thursday, June 8, 1893, at 11 o'clock A. M.]

Mr Robinson. — I may perhaps, before continuing, complete two references which I had not at the moment before me, as I ought to have had yesterday. One was to a letter from Mr George Canning of the 29th of May, 1824. It is to be found in our Appendix, Volume 2, part I, at page 61. It is not of very great importance, but these are the words I refer to :

> We take for granted that the exclusive claims of navigation and jurisdiction over the North Pacific Ocean, which were put forward in the Ukase of September, 1821, are to be altogether withdrawn.

And I refer as well to Mr Blaine's words in the 3rd volume of our Appendix, page 498.

> If we take the words of Mr Adams with their literal meaning there was no such thing as Russian possessions in America, although 44 years after Mr Adams wrote these words the United States paid Russia 7,200,000 dollars for these possessions, and all the rights of land and sea connected therewith.

Now, I am not sure, if Mr Senator Morgan if you will allow me to say so, whether, misled you yesterday in any way in explaining the position of the Fraser River as to where it comes out. Of course, it is not in the open sea in this sense, that Vancouver Island is between it and the main Pacific Ocean; but where it debouches at its mouth the Strait is about 40 miles wide, and there are a great many islands. That is the position of the water there. If I led you to believe that it opened on the open ocean without anything to obstruct the view, I was wrong in that, because it opens into a Strait 40 miles in width, the Straits of Georgia I think they are called.

The President. — It opens in that channel?

Mr Robinson. — Yes.

Senator Morgan. — The Straits of Fuca are different?

Mr Robinson, — Yes. I think they call this the Straits of Georgia.

Senator Morgan. — They run up the other side of Vancouver?

Mr Robinson. — Yes; the other is called Juan de Fuca.

The President. — The line with reference to the Arbitration of the Emperor of Germany went higher up, according to the map?

Mr Robinson. — Yes, into the Straits of Georgia.

Sir John Thompson. — The Fraser River debouches into the Straits of Georgia.

Mr Robinson. — Then, some references were made yesterday by my learned friend, Sir Richard Webster, as to the point raised by Mr Phelps, when he said that they did not intend to discuss the validity of the seizures

not considering that they were in issue here. I wish to give the Tribunal two more references which seem to us to bear on that point. In the first place, in the American Argument, at page 217, we find this expression. That is the section which deals with the damages claimed by Great Britain.

> We, however, preface what we have to submit on this feature of the case by saying that, if it shall be held by this Tribunal that these seizures and interferences with British vessels were wrong and unjustifiable under the laws and principles applicable thereto, then it would not be becoming in our nation to contest those claims, so far as they are just and within the fair amount of the damages actually sustained by British subjects.

That seems plainly to contemplate that this Tribunal is to hold one way or the other whether the seizures and interference with British vessels were wrong or justifiable or not under the laws and principles applicable thereto. If the Tribunal will turn to our Appendix Volume 3, No 1, 1891, at page 55, they will find in that very long letter of Mr Blaine, of I think the 17th December 1890, these words referring to a proposal made by Great Britain :

> Her proposition is contained in the following paragraph, which I quote in full :
> "I have to request that you will communicate a copy of this despatch, and of its inclosures, to Mr Blaine. You will state that Her Majesty's Government have no desire whatever to refuse to the United States any jurisdiction in Behring's Sea which was conceded by Great Britain to Russia, and which properly accrues to the present possessors of Alaska in virtue of Treaties or the law of nations; and that, if the United States' Government, after examination of the evidence and arguments which I have produced, still differ from them as to the legality of the recent captures in that sea, they are ready to agree that the question, with the issues that depend upon it, should be referred to impartial arbitration. You will in that case be authorized to consider, in concert with Mr Blaine, the method of procedure to be followed."

Now that is an extract from a letter by Great Britain speaking of the hypothesis, which of course was a certainty, of the United States differing with them as to the legality of the recent captures in that sea, and the issues dependent upon it, and saying thet they are ready to agree that the questions with the issues depending upon them shall be referred to an impartial arbitration. Having cited that Mr Blaine goes on to say :

> It will mean something tangible, in the President's opinion, if Great Britain will consent to arbitrate the real questions which have been under discussion between the two Governments for the last four years. I shall endeavour to state what, in the judgment of the President, those issues are.

As I understand, he refers back to issues that depend on the legality of the recent seizures; and then he states, for the first time, these 5 questions — or 6 questions as they were then, the 6th having become the 7th in the Treaty, — as he proposes them; and, as the Tribunal are aware, they were accepted with certain modifications.

I now proceed to the argument which was in progress yesterday when the Tribunal adjourned. I had said all that I desired to say with regard to the assumption or argument by the United States, that they were in the position of trustees in this particular matter, and the only element I had omitted to notice was that I remember my learned friend Mr Car-

ter did attach to that argument the condition that the prices should not be prohibitory. Now we know as a matter of fact that the price is prohibitory, that is to say, when you speak of being trustees for mankind at a price at which you are ready to sell the produce of this trust property, I suppose it would be a very fair average in all probability to say that there is not one in 10,000, if one in 100,000, to whom the price is not prohibitory. In truth it is an article only within the reach of very rich persons; and in reality this trust obligation — which my learned friends assert is incumbent upon them, with which they assert other nations are bound not to interfere, as to which they say there can be no question whatever of the blessings which they are conferring upon mankind — is really, without exaggeration, reduced to this, that they are to sell seal skins to millionaires at a profit of 1,000 per cent. That is the precise duty asserted here, and the precise obligation incumbent upon them.

I now leave that subject, and proceed to the other two or three propositions which I find laid down by my learned friend as facts, by which they can settle the question whether this property does belong to the United States or not. The Tribunal will find that for about 20 pages, I think beginning at page 50, the attention of the Tribunal is invited to a somewhat careful enquiry into the original causes of the institution of property and the principles upon which it stands; and having discussed the origin of that institution, and the principles upon which it stands, for some 20 pages, we find it said at page 68 that.

> The foregoing discussion concerning the origin, foundation, extent, form and limitations of the institution of property will, it is believed, be found to furnish, in addition to the doctrines of municipal law, decisive tests for the determination of the principal question, whether the United States have a property in the seal herds of Alaska; but it may serve the purposes of convenience to present, before proceeding to apply the conclusions thus reached, a summary of them in concise form.

I do not think it is necessary to read the first two or three propositions. The ones with which I am mainly concerned are to be found at page 69.

> The extent of the dominion which, by the law of nature, is conferred upon particular nations over the things of the earth, is limited in two ways:
>
> 1. They are not made the absolute owners. Their title is coupled with a trust for the benefit of mankind. The human race is entitled to participate in the *enjoyment*.
>
> 2. As a corollary or part the last foregoing proposition, the things themselves are not given; but only the *increase* or *usufruct* thereof.

Now it is said that those are the principles upon which this contest as to the property between these two nations is to be decided. In the first place I venture to say that those principles are not found in any system of law of any nation in the world, never have been part of any system of law, as we understand the term « law », never will be part, and in the nature of things never could be part of it. Is it really seriously asked that this question of property between two nations is to be decided upon

principles which never formed part of the law of any nation in the world? I mean by « law » a system which declares and enforces legal rights.

I think the simplest test of that is this : Let any one go to Congress or to the Parliament of Great Britain and ask them to embody in an Act of Parliament these provisions : first of all, that people are trustees for mankind of the property which they possess ; in the next place, that they are not the absolute owners, and that the things themselves are not owned by them, but only the increase or usufruct thereof. What would be said to any such proposition? What would be said in either country would certainly be, that a man bringing forward such propositions could know very little of human nature ; and yet it is said this is the law of nature, and that such propositions are to govern this case. Is that an unreasonable test or a reasonable one? Would any man be listened to as a man of ordinary practical intelligence, fit to deal with the affairs of human life, if he were to propose that either of those two propositions should be embodied in any system of law on the ground that they were following the law of nature? Would not the answer be, the man that brings forward those propositions as desiring them to form part of practical law must be utterly unacquainted with human nature?

Senator Morgan. — Does not the law of descent and distribution all depend on the fact that it is part of the law of nature?

Mr Robinson. — I should have thought very distinctly not, if you ask me ; but I must first ask, though I do not ask it from any feeling of presumption — I first ask some one to tell me what nature has enacted. I have not the slightest idea of what the law of nature is, and I do not believe anybody else knows. It is an indeterminate something ; nobody can tell what it means anywhere, and it is certain that it means something different in every nation of the world.

Senator Morgan. — Might it not be called Divine Law, in the sense that it is used in the Scriptures?

Mr Robinson. — Well, I did not wish to touch on Divine Law ; but as that has been referred to, I would say this : the only instance I know of where property has been taken from a man on the ground that the had not made good use of it, except on the ground that he was a lunatic, is in the parable of the ten talents. I have never heard of it since, and I do not believe that anybody has been encouraged by that instance to endeavour to embody those principles in any code of laws as a proposition of law.

Now you have asked me if the law of descent and distribution is not part of the law of nature? I ask, is it part of the French nature, or British nature, or American nature?

Senator Morgan. — Well, it depends on the nature.

Mr Robinson. — I agree, it depends on the nature ; but I do not understand a law which varies according to the nature of different individuals or different nations. If so, it means nothing, and I really believe it does mean nothing. I do not believe the law of nature means anything

except in some elementary particulars. You may say that the law of nature teaches affection for children and offspring, and things of that sort.

Senator Morgan. — Well, it has been so much written about, that I supposed it to exist.

Mr Robinson. — Yes; there has been a good deal written about it; and, if you refer to two references given to the Tribunal by the learned Attorney General, you will find the highest authorities known in that branch of jurisprudence say it practically means that it is an indeterminate something which people refer to without knowing what they mean, and being utterly unable to tell what the law to which they refer ordains or directs.

I venture to submit, again, that the illustration I have suggested is absolutely conclusive. If this property between nations is to be determined upon these propositions, which were asserted to be reasonable propositions, they are propositions which ought to be found in some system of law. If they are new discoveries are they propositions which by their reason would recommend themselves to any Legislature or to any country which was invited to embody them in their system of law? As a matter of fact, anybody who has a child's knowledge of human nature must know that it would be absurd to attempt to embody them in any practical system of law, or to enforce them. You cannot make people trustees for mankind of their property. You may say to people, "You should not waste your property; the principal does not belong to you. You are only entitled to the interest". I am aware that many things are spoken of as rights which are simply rights in the ordinary sense of ethical rights or wrongs and moral duties. You may say that a man has no right to waste his substance and leave his family penniless. That is practically true; but in what sense? It is absolutely impossible to say that he has no legal right to do it, because he has, and no law can prevent it if the man is sane. Again, you may say that no man has a right to lose his temper, and make charges against people without just grounds. No more he has; but can you imagine any law that would attempt to prevent it? You may also say that a man is bound to be careful of what he has got, and to make the most of it; and, in a certain sense, he has no right to do otherwise. In the case I first put it might be fairly said that it would be disgraceful and discreditable to him if he dissipated his property and left those dependent on him in want; but the world is full of such instances, and also of people who deplore them and would do anything to prevent them, and who if it were possible to make a law to reach them, would try to make that law. But no nation has attempted to do it, and no sensible man has attempted it; and yet they say it is upon such principles this question between these two great nations is to be decided by this Tribunal.

I venture to say, with great respect, it is impossible so to decide a question, of this sort, and if those are said to be the decisive tests, very few minutes argument will show that they are tests which cannot decide that

question, if we are right in saying that the question submitted to the Tribunal relates to rights to be decided according to law.

I will not delay the Tribunal by going into the further question of the necessity and propriety of applying to everything which is capable of ownership, or giving to everything capable of ownership, an ownership, except to say that one reason on which it is said to be founded does not seem to me to apply here. One of the main reasons is that the arts would not be practised, that the fruits of the earth would not be rendered available, unless the institution of property was awarded to encourage people to exercise their industry so as to obtain for themselves and for others those benefits. I have never heard it said that the awarding of property in animals *feræ naturæ* to the first man that can take them has discouraged the practice of hunting. On the contrary, it is that on which it rests. The only way to get these animals is by the chase; and nobody has said that animals *feræ naturæ* are not made available to human wants to the best extent they can be by the practice of hunting, which is the art, I suppose, referred in connection with that subject.

Then they say these animals are useful, and an object of eager human desire, and that there is no substitute for them.

Is not that language very greatly exaggerated? Is there any one thing — perhaps you might include three or four others, — without which the world could do better than seal-skins? Seal-skins and diamonds, and things of that sort, are about equally useful and equally necessary. I admit that they are valuable, and I admit it is desirable to have them; but when you say that they are eager objects of human desire, they are eager objects of human desire to some of the people who can afford to pay for them, and with some few only even of those; and to speak of them as one of the things which there is any special necessity to continue to give to the world is to exaggerate, and to say what has no and reasonable or proper, or sensible application to the subject we are considering.

Then, I desire to say a few words on the question of cruelty and of waste. Now, my learned friends, in many sentences, — (I have them all before me, or I have them near by) — at all events, in 8 or 10 sentences, at least, at different places, have as part of their argument, and in that part of the case which deals with the right of property and protection, not with Regulations, charged the pelagic sealers with cruelty, involving useless suffering; and with waste.

Now, first, I would ask, how far can either of those charges have any bearing whatever upon, or any relation whatever to, the question of the right of property? Their charge is that we are either injuring their industry, or destroying their property. Does it make a particle of difference whether it is done cruelly or not? I am not speaking of cruelty as I hope to do in a few minutes, or defending it. I consider simply the legal question. Has the question of cruelty, or the fact of cruelty or the absence of it, anything to do with the right of property, or can it have?

Suppose the pelagic sealers tortured to death every seal they captured, but did not injure the United States industry, and supposing those seals were not the property of the United States, or even that they were the property of the United States, the fact that we tortured them to death would not make any difference in their rights. They could recover if they have a claim for the injury to the industry or if they own the seals. Suppose we tortured to death every seal killed but did not hurt the industry, what possible right could that give them to complain? Suppose, on the other hand, we chloroformed every seal we killed, and they did not suffer at all, but still we killed enough to injure the industry, then they would have a right to complain because we had injured it. Cruelty has nobearing upon the matter, as I submit. If so why were those charges introduced here, if not simply to endeavour to prejudice our claim, which is adverse to their own, by sensational charges which have no bearing on the legal rights or legal wrongs of the case?

In the next place, what has our waste to do with the question of legal right? My learned friends were asked very emphatically and distinctly by the learned Attorney General to define their position. Do they mean to say their right depends in any way or sense upon the mode in which we deal with these seals — economically or uneconomically — waste fully or with an absence of waste? No answer was returned to that. I do not ask the question again, because I am certain that what they would not tell the learned Attorney General they are unlikely to tell me.

Now let us see what effect it can have. Can the question of whether a thing is my property or not depend upon the use which some one else makes of it, wasteful or economical, when he gets it, or the use he is going to make of it? If it is my property I am entitled to it. If it is not my property, how can the fact that when he gets it he intends to burn it or sink it in the sea or destroy it, tend to make it my property? Again, how can the question of waste affect their right to protect their industry? If we kill 1000 seals and it affects their industry, and they have a right to prevent our affecting their industry by the destruction of seals, how can it affect the question what we do with the seals? Their industry either prevails over ours or it does not. If it does prevail over ours, we have nor right to exercise ours in any way, economically or uneconomically, to their prejudice; and if it does not prevail over ours, as we contend, we have a right to exercise ours. But how the waste, or rather uneconomical use, of the thing itself which they claim a right to protect, by us when we take it can affect the question, I have always been unable to understand, and I venture to submit every other person who considers it with a view to working out the question of property, will also be.

Then my learned friend the Attorney General calls my attention to the fact that the same argument is used by Mr Coudert as a portion of his argument at page 713, in answer to the charge of mismanagement on the Islands that we were then making :

> One single word more as to the management. The British Government have

endeavoured to show that too many male seals have been killed on the Pribilof Islands beginning with the year 1870, and that a gradual deterioration in the herd has been taking place. Even if this could be shown it would form no justification for pelagic sealing, and would therefore be considered irrelevant. Suppose it were true; suppose the United States had been reckless or had employed corrupt and bad agents, the principle is admitted to be good. The property — I will not say is conceded — but is proved to be theirs on the islands; and if pelagic sealing is destructive, the fact that we must do our sealing on the islands cannot be disputed. Suppose these seals were under the control of the United States, as well as the islands, would that make any difference, and would anybody say that we had less right to protect seals at sea because they were not treated well on the shore?

In other words, it is precisely their argument in answer to us. They say what business is it to you how we treat the seals on the islands?

That may be a sound argument on the question of Regulations, with which I have nothing to do at present. I deal simply with the legal question as to the right of property or the right to protect the industry. The truth is it has no bearing upon it. It cannot affect it in any way, and why it was introduced except for the same reason as the charges of cruelty we are at a loss to understand.

Now I pass to the charge of cruelty, which is made against us as an offence. I wish to deal with that for this simple reason. I am supposed probably to represent more particularly that portion of the Empire which is especially interested in this industry.

I do not desire to speak the interest of Canada or British Columbia in this question at present, though it is very vital. I do not desire to do so now, for the reason that what we are discussing here is the question of legal rights. The law has to prevail; the law has to be obeyed; and it could make no difference whatever even if British Columbia lived exclusively on this industry; if she claimed to do so without legal right she must give it up and take the consequences. I agree that on the question of Regulations those considerations may have a different weight and be entitled to a different influence. Here I speak of this charge of cruelty because the charges are made against citizens of British Columbia, and my learned friends will not be offended at what I say, because they charge their own citizens in the same way with committing a crime which every civilized nation is bound by the law of nature and by their obligations to civilized society to put down and punish.

Pelagic sealers are described as *hostes humani generis*, and I think it is very difficult to express too strongly the atrocious character which they assign to what we think is a perfectly justifiable and proper industry in which we and their own citizens are concerned.

They tell us that it is abhorrent to the law of nations, and that the lawof nations is founded on the law of nature. I might have said at an earlier portion of my argument, but I venture to say it now as not altogether inappropriate, that my learned friends have this formidable difficulty to contend with : that the law of nations, which is founded on the law of nature, does not interfere with but permits slavery. I should like

to know how they can call upon that law to put down pelagic sealing. Is it possible that the great principles of morality upon which that law is founded, but which, nevertheless, through that law, permit slavery with all its horrors to continue — is it seriously arguable that the same principles of morality must nevertheless put down pelagic sealing? That, at all events, is the proposition which my learned friends have to contend with, which they have seen that they have to contend with, and which they answer only by saying that perhaps, if the question should come up again it might now be decided differently. It could not now be decided differently by that most eminent judge, or by any other judge acting on principles of international law, unless it could be shown that nations in the meantime had assented to make the prohibition of slavery a part of international law. The question would not be, as he himself most clearly and explicitly said, what was his own nature and feeling, and the feeling of nearly all the nations of the civilized world — it was not what they would dictate; but the question would be, what had all the nations of the world consented to; and neither Chief Justice Marshall nor any other Judge could make international law different, because the feelings of those nations that had put down slavery if there were other nations which did not consent to make it had grown stronger against it, part of the law by which they would all be bound.

Now as to this question of cruelty, I shall not read passages again, in the United States argument, which have been read already, and which are plainly sensational and exaggerated, or any passages on our own side. There is one passage which Mr Carter read, in which he describes the gravid females being opened, the milk and blood flowing in streams upon the deck; but let me ask, what special not cruelty is there there more than any other killing. I do not defend this or say that it is right; but cruelty I understand to be the infliction of suffering; and what more cruelty is there in shooting a gravid female than a young male, as a matter of cruelty. I think it is right to make this correction with regard to cruelty, as my learned friend the Attorney General reminds me, namely, that it is the gratuitous infliction of suffering — suffering which is gratuitous, useless and unnecessary; but in that sense there is no more cruelty, and no more gratuitous infliction of suffering in shooting an animal in one condition than in any other. I will venture to say this with regard to cruelty : Of all the witnesses we have cited, Mr Palmer at all events has stood so far unquestioned, and Mr Palmer is a gentleman of science sent by an institution which stands, if not at the head, almost at the head of science on the continent of America. He was sent by the Smithsonian Institute to examine the state of affairs in those islands.

General Foster. — We most seriously question that.

Mr Robinson. — I do not speak of your seriously questioning. The accuracy, of course, they question — they question the accuracy of every charge made; but I speak of their questioning the veracity and high character of Mr Palmer: nothing else. I do not think there is much object

in their questioning a thing unless they can disprove or impeach the veracity of the witness.

Now Mr Palmer's letter, at all events, is to be found in the report of the British Commissioners at page 189, and you will see what is said by him. This is a paper read before the Biological Society of Washington.

General Foster. — A part of a paper.

Mr Robinson. — Yes, said to be an extract of a paper. The other portion of it, I may say, is given by the United States in their Counter Case.

General Foster. — The whole article in full is given.

Mr Robinson. — No, I think not. I think what you have given is what we did not give, but I may be wrong about that. However, that is my recollection. I think they gave what we did not give, but we have the whole paper between the two, so that it is of no importance whether I am right or General Foster is right. I am quite content to assume that I am wrong in a matter of this kind.

Now I will not weary or pain the Tribunal by reading that letter again, which has been partially read already. I repeat, whatever may be said about Mr Elliot, or whatever may be said about others, I am not aware that there is a shadow of ground for doubting Mr Palmer's entire veracity. He speaks of what he had seen, and testifies to what he knew by personal observation; and it is not too much to say, and I speak to those who can verify my assertion by their own reading, that a more pitiable, painful story of utterly useless, barbarous cruelty inflicted upon dumb animals cannot be imagined. I do not think that these words are in any way or sense exaggerated. I am speaking now of the method of driving the seals which Mr Palmer observed on the Islands and its effect, and the words which I have used I attribute to that system. I am not reproaching the United States in any way. As Mr Palmer says, they have to manage dumb animals through the medium of half-civilized men, and until they get a different class of supervisors, it will be utterly impossible to do very much to moderate that — I believe it will be found wholly impossible; — but Mr Palmer describes what I have said, and to put it shortly, it is this. " Countless thousands ", to use his own words, of those dumb animals have been done to death — to a death of long, lingering agony — simply by mismanagement; and their bodies have been wasted. Anybody may test what I say, and form for himself his own judgment by more than reading, because he may do it by personal observation. Let any one go to either of the Gardens here, where the seals are to be found, and watch one of those animals proceeding at its leisure, without being urged, along the smooth gravel path; and then let him try to imagine what the sufferings of these poor brutes must be when driven from one mile to three over sharp stones by boys or savages or half-civilized men. Now that is what is done there. I say nothing about the United States. I make it no subject of reproach; I merely say they are not in a position to reproach us. I venture to say

this — If this case depended on the question, by whom has the greatest amount of gratuitous and unnecessary suffering been inflicted upon the seal race, and by whom has the larger number of that race been utterly wasted — by the system pursued upon the Islands or by pelagic sealers; if this case depended on that question, and if the seals could speak of what they knew and had felt, I should be perfectly content to leave the case to their decision. There is no question, if Mr Palmer tells the truth, as to what the result has been. The system has to be altered there, and it may be altered as far as it is in their power to do it; but it is very difficult in an out-of-the-way part of the world, and with the class of men they have to deal with, to secure the right class of man.

Now Mr Carter at page 204 of their argument, answers a remark of the British Commissioners, in which they say that, in anything said in favour of pelagic sealing, it must be remembered that it is an industry followed by the United States' citizens and open to the United States citizens as well as to us, and they are not speaking in the interests of one nation only when they speak of it as being rightful, or discuss by what means or by what regulations it can be reasonably or properly pursued. The answer which is made is that the United States —

> Deems itself bound by the spirit and principles of the law of nature, holds itself under an obligation to use the natural advantages which have fallen to its lot, by cultivating this useful race of animals to the end that it may furnish its entire increase to those for whom nature intended it, wherever they dwell, and without danger to the stock. It holds, as the law of nature holds, that the destruction of the species by barbarous and indiscriminate slaughter is a *crime*, and punishes it with severe penalties. Its enactments, adopted when it was supposed that the only danger of illegitimate slaughter was confined to Behring Sea, were supposed to be adequate to prevent all such slaughter. Are the United States to be deprived of the benefit of the seals unless they choose to abandon and repudiate the plain obligations of morality and natural law?

Now, if they thought that there was no illegitimate slaughter outside Behring Sea, the United States have learned long ago, or some years ago at all events, that this was a mistake, — and how it is possible many people could have thought so, it is difficult to see if they knew anything of the habits of the seals then. If they believed that it was their duty to other Nations and to the civilised World to put down and punish the perpetrators of this crime, why did not they put it down and punish it outside Behring Sea? I understand why; because this kind of language and argument was not in their minds. Their Legislation was intended, as the Legislation of all nations has been intended, not in the interest of the feelings of animals *feræ naturæ*, but in their own material interest and for their own benefit. Let me see what answer is given by my learned friend, Mr Carter, when in the course of his argument. It was pointed out that they had the power, because they can prevent their nationals committing this crime against nature any where, and — if they are *hostes humani generis* all over the world, why do you say they must not be so in a portion of the world only, namely inside Behring Sea?

The answer was,

Of course, it might be said by Congressmen, if all the world is to be permitted to go up there and take the seals, we might as will let our own nationals go. We will not protect the seals against attacks by our own citizens if other people are to be allowed to attack them. —

In other words, and the President has put that very strongly in reprence to the suggestion made by us, if they were correct in their argument, they should have prevented it everywhere, — I ask are those positions consistent? Is my learned friend really saying that one of the Members of their Congress might say.

This is barbarous and inhuman, and an act which every civilised nation is bound to put down; but if other nations are going to carry it on, then we will let our own people carry it on with them?

What my learned friend says is, it might be said by Congressmen; or, in other words, it might be said by the Members of a Parliament of a civilised Nation, that.

Other Nations are guilty of this barbarity; why should not our nationals share in it, till other Nations choose to put down such enormities?

I am really treating this matter in a reasonable spirit, I venture to submit, and in the spirit in which only it can be approached with any reason.

I am saying nothing invidious here, because I have no charge to make against the people of the United States which I believe does not lie against every other nation of the world. But it is true, and we might as well look that in the face, that neither law nor legislation of civilised nations up to this time have ever been prompted or influenced by the feelings of animals *feræ naturæ*, to any extent whatever; they have been dealt with as best suited what were supposed to be the material interests of the Nations.

Take the case of the Buffalo, which we all know. I have extracts here from Mr Allen, a man vouched for by the United States as a man of high character and attainments; who has published a monogram on the Buffalo, warning the United States that they were being destroyed, and calling upon them to save them. Those animals, both in the United States and Canada, — this affects both Nations, — were slaughtered recklessly and ruthlessly, without regard to time, or place, to sex or age. They were slaughtered by thousands, and left lying on the Prairies, for the sake of their skins. As a matter of fact, their skins were much more useful than seal-skins. I venture to say, and those gentlemen who know that part of the world will say if I am right or not, that for one person to whom seal-skins have brought comfort and warmth, in all probability buffalo skins brought it to ten. They were articles sold for a moderate price, and I recollect myself when you could get them for 4 or 5 dollars, and were universally used by people of moderate means. But the Buffalo race had no influential Corporation interested in their existence, and yielded no revenue to the Government and nobody took the slightest interest in

them. They were slaughtered by white men called " skin-hunters " and Indians; and, if we may resort to the law of nature, I do not know how we are to get nearer to it than to see the method in which those Tribes, who have been called by some of the greatest novel-writers " the untutored children of nature ", were prompted by the laws of their nature to deal with dumb animals.

Uncivilized men were acting under the law of nature; civilized men never interfered to prevent it. Other instances can he found, in the feathered tribe for instance. I am sure one or two members of the Tribunal to whom I am speaking remember the Passenger Pigeon.

Senator Morgan. — With reference to the Buffalo. In order to civilise these Indians and get them into agricultural pursuits we were obliged to permit their support of wild game to perish.

Mr Robinson. — I accept the suggestion. I am very glad you have mentioned it, Sir, for this reason. That matter is alluded to in either the argument or Counter Case of the United States, and it is said that it was necessary to exterminate the buffalo in order to make way for the Ranchmen, and for a better and superior race of domestic cattle.

Senator Morgan. — That is true also.

Mr Robinson. — That is true to a certain extent. I am perfectly willing to admit that eventually the buffalo would have had to give way; but there are at this moment thousands — nay, tens of thousands of square miles where the Buffaloes have been exterminated, bul where civilization has never come, and where, for the best part of another generation, both in Canada and I believe the United States, it may not come, but the buffalo has been exterminated because it hads no friends — that is the whole story. The Ranchmen did not like them; the Settlers did not like them; and nobody cared either for humanity, or civilization; or for the interests of the buffalo.

Senator Morgan. — Very much like the rabbits in Australia and in England, they may be considered to be noxious animals.

Mr Robinson. — With great deference, I do not think the buffaloes could be considered like the rabbits in Australia. I venture to say that you yourself Sir, on reflection, will hardly consider it a fair analogy. But we all know — those who have journeyed ower the prairies — that we have found the bones by hundreds of these animals which have been slaughtered. I have been told by one person that he has seen 2000 killed in what is called a single run in a small portion of the day. The bodies were left on the prairies, and nothing taken but the skins. At all events neither civilization, humanity nor anything else interfered to prevent it.

I was going to refer to the Passenger Pigeon as another instance in reference to birds. They are birds, whose habits in one respect, are strongly analogous to the habits of the seals. The Passenger Pigeons, within my recollection, were in absolute myriads in the United States and the Northern States of Canada. Their habit was in the breeding season to take up their abode in an enormous tract of wood. I have

seen two such " Pigeon Roosts " — one some miles long, and about a mile broad — in which there would be found from two to twenty nests, on every tree, and the birds were there in absolute millions. The people round about shot the birds in their nests, and they destroyed the young, and tried in every possible way to slaughter them, and thus a most useful food bird to man was exterminated. Nobody interfered to prevent it. The Walrus was destroyed in the same way and exterminated, or nearly so, and the sea other; and when my friends say that cannot he prevented, they have Statutes on their Statute Books, which, according to our evidence, have not been enforced. And we show there is a possibility of practising husbandry with the Sea Otter : that the Russians have tried to keep preserves, but the Sea Otters are gradually becoming extinct.

As to the seals themselves, I would ask the Tribunal to be good enough to refer to the British Commissioners' Report, page 89, sections 511 to 514. You will find, Sir, that as late as 1881 these seals were treated thus — 10,000 of them were actually destroyed simply to prevent the Japanese from getting any of them. Perhaps I may as well read just a few sentences to shew how it came about.

Section 511 of the British Commissioners' Report it as follows : —

In 1871, *this island*_____

that is Robben Island_____

with the Commander Islands, was leased to Messrs Hutchinson, Kohl, Phillipeus, and Co., who transferred their rights to the Alaska Commercial Company. Mr Kluge went there in the same year in the interests of the lessees, and found that, in consequence of the raid in 1870, there were not over 2,000 seals to be found on the entire island. The island was watched in that year, but no seals were killed. A few may have been killed in 1872, though, if so, the number is not known ; but from 1873 to 1878 rather more than 2,000 skins were on the average taken annually by the Company from this one small reef.

512. About the year 1879, schooners sailing from Japan began to frequent the island, and were in the habit of raiding it in the autumn, after the guardians had been withdrawn. In 1881, the Company's agent remained on the island as late as the 5th November, at which date five or six Japanese schooners were still hovering about, looking for a chance to land. The Dutch sealer " Otsego " was warned off by the Company's trading steamer " Alexander. " In consequence of such raids, the number of seals declined from year to year.

513. Probably discouraged by the cost and difficulty of protecting the island, and in order to prevent competition in the sale of skins, the Company in 1883 made a barbarous attempt to extirpate the seals on it. A full account of this attempt is given in the deposition of C. A. Lundberg, who arrived at Robben Island in the schooner " North Star " from Yokohama, and found the mate of the schooner " Leon, " a vessel in the employ of the Alaska Commercial Company, living on the island with about fifteen Aleuts. Lundberg found a great mass of dead and decaying seals upon the shore, which had been killed by these men, as they said, in order to " keep any of those Yokohama fellows from getting anything this year. " The crews of the " North Star " and another schooner, the " Helene, " then set to work to remove the carcasses, which included those of many females and young, and proved to number between 9,000 and 10,000. In the process, they managed to pick out some 300 skins in good condition. There were thousands of seals in the water, but they would not pull out on the beach on account of the stench and filth.

Senator Morgan. — What was that Company?

Mr Robinson. — The same Company as I understand.

Senator Morgan. — Holding a lease under Russia, was it?

Sir Charles Russell. — They were holding a lease of Robben Island under Russia.

Mr Robinson. — This the Tribunal will find verified by the affidavits of Captain Folger, and Captain Miner, which are to be found at pages 89 and 113.

Senator Morgan. — Let me ask, was this massacre of the seals ever called to the attention of the Russian Government.

Mr Robinson. — I cannot say — I do not know whether it was or was not; but it was a vessel in the employment of the Company.

Then the British Commissioners say this in paragraph 514 :

> We vere also informed that Captain Hansen, afterwards master of the German schooner " Adele, " was present on this occasion. Captain Miner, an experienced sealing-master of Seattle, also visited the island in the same year, and described to us the great heap of carcasses which he found on the island, and the manner in which the skins had been slashed in order to render them useless.

In other words, lest they should get into the hands of rival traders — into the hands of the Japanese — 10,000 animals were slaughtered and their skins were destroyed.

I have also another extract here which carries out what I say as to the difficulty of securing anything like humanity to these poor beasts when in charge of such people as it is necessary to employ. In the Report upon the Fur-Seal Fisheries of Alaska (which has been referred to several times in the case here on other points), I find this sentence at page 32. It is evidence taken before Congress on the Fur-Seal Fisheries :

> *Q.* Did the Company, in its administration of affairs there, seem to take care for the preservation of seal life as well as care over the natives? — *A.* Yes, Sir. We could not get the natives to try to preserve the seal life. Boys of twelve and fourteen years old would kill the seal pups. They say they are mild sort of people, but they never have a chance to abuse a dumb creature but what they do it. The only time I had any person incarcerated was a boy about eighteen years old. I took him and put him in the cellar of the store and kept him there two days for killing pup seals.

And so on. That is a small illustration of the difficulty which is found in securing humane treatment with the appliances at hand.

The place is far off; the climate is inhospitable; the drives take place at two o'clock in the morning in charge of people of this description, who, as Mr Palmer has said, much prefer their beds to a cold wet foggy place at that time of the morning, and the Seals are hurried on with the result which is described.

Senator Morgan. — What is the object of driving them so early in the morning.

Mr Robinson. — Because they are killed at 7.

Senator Morgan. — Why not at 12, or 1 o'clock?

Mr Robinson. — Because of the heat, I fancy — I should think so; I cannot say I know.

Now my friend Mr Coudert has talked about tampering with the law of nature, and he has told us that the law of nature can never be tampered with impunity; that the punishment is inexorable. I venture to say the greatest defiance of the law of nature we have heard of is to drive poor beasts not intended for progress on land for two or three miles over ground of the description which is given there — over stones so sharp and so pointed that even the natives themselves avoid them and take another path. That *is* tampering with the law of nature, and tampering with the law of nature in the very worst possible manner. It cannot be done with impunity, but the difficulty is that the the punishment does not come to those who practice it, but to the animals themselves, and thousands of the race have been wasted simply by the methods adopted there.

Now pelagic sealing may have its objections — I think it has. There is some cruelty about the pursuit of all dumb animals. I only call attention to this because it is right to say that these charges are unjust and unreasonable when you charge pelagic sealers, many of whom are most respectable men — many of whom are supporting their families by what I believe to be and what I have no hesitation in saying is a respectable employment — when you charge these men with all the crimes of the Decalogue, we have the right to turn to the conduct of those by whom the charge is made, and ask if it lies in their mouth to make it. I venture to say it does not.

I do not think, Mr President, that there are any other topics which, in the view I have taken of this case — (the only view, as I said in the beginning, in which it seemed to me I could be of any possible use to the Tribunal) — it seems necessary for me to make. Recurring again to what I ventured to say with regard to International Arbitrations at the opening of my argument, I may add that when nations submit to a Tribunal of this character their rights, they mean their rights to be determined by law, and they mean a definite certain law which can be found by anyone laid down somewhere — a law, which may afford a sensible guide in the conduct of human affairs — not theories, not speculations, not the opinions of metaphysicians as to what the law ought to be, and as to what it would be well to make it, or what the law would be if human nature were changed; but their rights are to be determined by the law it as we find it, which I take it is always, and on all occasions, the embodiment of what nations believe to be right and desirable, and what in practice can be enforced. We believe this claim, judged by these common sense principles, fails altogether, and we submit there is no reasonable ground — no legal ground — upon which the United States can claim either a property in these animals or an industry which they have a right to protect.

I do not desire to add any remarks upon the question of the right of

protection, and merely for this reason : in the first place it has been very thoroughly discussed, and in the next place I entirely agree, if I may venture to say so, with what my learned friend the Attorney General has said. If it is their property, we have to respect it; and it is very little use (except as regards the past, and the seizures) to discuss it further. If they have a right of protection, or if they own the seals, their property and their right will have to be respected.

As regards the right to condemn and to seize vessels, I do not profess to be very familar with the subject, but I should have thought it was absolutely clear that condemnation and seizure were things which can be enforced only by some positive maritime law. If a vessel of any nation, for instance, were to come to a port of England and steal some government property, it is inconceivable that there would be any right to follow that vessel, seize her, bring her in, and condemn her — condemn a vessel of the value of £10000 because she had stolen £10 worth of property! You could only do that under some I international law which gives the right according to the law of nations; and this can never be except in the case of piracy, or under some municipal law — some valid law — within the territory of the nation in fact, and which therefore can be enforced.

That, Mr President, is all I think I can add with any hope of being of the least use; and I can only thank the Tribunal for the patience which which they have listened to what I am perfectly well aware must have been, to a large extent, repetition.

The President. — Mr Robinson, we think you have made very good use of what you were pleased to call (with I think excessive modesty) the scraps and leavings of your leaders; indeed you have made very good work from those, and we are thankful for it.

TO THE BINDER

This page to be omitted.